[fol. 324] 5.

With the advent of the post-World War II building and economic boom, following the discovery of oil and the rapid development of commerce in Midland County, this population growth continued at an accelerated rate in the 1950's. Following the growth pattern of prior decades, virtually all of this increase in population was confined to the City of Midland and to County Commissioner's Precinct No. 1. During this period several requests were made of the Commissioners' Court of Midland County to redivide and redistrict the Commissioners' Precincts of the County for the convenience of the people thereof by effecting a more equal distribution of population, qualified voters, taxable values, land area, and other pertinent factors among the Commissioners' Precincts; however, the Commissioners' Court failed and refused to make any changes in the boundaries of such Precincts as established by the Order of 1898 and modified in part by the Order of 1908.

6.

By 1960, according to the Federal Decennial Census of that year, Midland County had a total population of 67,717 persons, of which number 62,625, or 92.48%, resided in the City of Midland, which, as stated before, was then and has been at all times since, situated virtually entirely within the boundaries of County Commissioner's Precinct No. 1 in said County. In such year, the total population of the County was distributed among the Commissioners' Precincts approximately as follows:

1960 Population

Precinct No. 1	Precinct No. 2	Precinct No. 3	Precinct No. 4
66,225	298	414	780
(97.80%)	(.44%)	(.61%)	(1.15%)

[fol. 325] In such year, Midland County had 19,780 qualified voters who were distributed among the Commissioners' Precincts as follows:

1960 QUALIFIED VOTERS

Precinct No. 1	Precinct No. 2	Precinct No. 3	Precinct No. 4
19,450	68	178	176
(97.88%)	(.34%)	(.90%)	(.88%)

In such year, other things, such as market value and assessed value of taxable property, miles of county roads, land area, allocation and use of County funds and revenues, and others, were disproportionate among the Commissioners' Precincts of Midland County, all making the Commissioners' Precincts established in 1898 and modified in part by the Order of 1908, which remained unchanged and in effect, grossly impractical and inconvenient to the people.

7.

These facts, figures and things, alleged above, remained substantially the same in 1961 and 1962, yet the Commissioners' Court of Midland County continued to fail and refuse to redivide and redistrict the Commissioners' Precincts of such County for the convenience of the people. On the 24th day of September, 1962, Plaintiff appeared before the Commissioners' Court of Midland County with a petition and request, which he duly presented, for such Court to redivide, redistrict, and reapportion the Commissioners' Precincts of said County for the convenience of the people thereof and in so doing to provide a more equal distribution of population, qualified voters, taxable values, land area, and other pertinent things among such Precincts, thereby insuring to Plaintiff and others similarly situated their rights and guarantees under the Constitutions and laws of the United States of America and the State of Texas. Such petition and request was refused. Shortly [fol. 326] thereafter, Plaintiff brought this suit, invoking the jurisdiction of this Court under its supervisory control of County Commissioners' Courts, under the provisions of Article 5, Section 8 of the Constitution of the State of Texas, all as more fully shown by the pleadings and papers on file herein.

8.

During the pendency of this suit, to-wit: in July and August, 1963, but before trial was had on its merits, the Commissioners' Court of Midland County, Texas, composed of Defendants Gideon, Bryant, Moreland, Osborne, and Culver, purported to hold and conduct public hearings on the matter of redividing, redistricting, and reapportioning the County Commissioners' Precincts of said County. During the course of such hearings, Plaintiff and many others appeared before said Defendants and requested that the Orders of 1898 and 1908 and all prior Orders relating to the establishment of Commissioners' Precincts of said County be set aside, rescinded, and repealed and that such Defendants pass and approve a new Order of the Commissioners' Court dividing the County into four Commissioners' Precincts for the convenience of the people. At such hearing, Plaintiff presented to said Defendants a suggested plan or guideline for the division, redistricting and reapportionment of such County into Commissioners' Precincts. Such plan or guideline was in all things proper, practical, and for the convenience of the people. It was designed to divide the County into Commissioners' Precincts having a substantially equal number of people, qualified voters, square miles, miles of County roads, taxable values and other pertinent things, thereby serving the convenience of the people of Midland County and insuring to Plaintiff and others similarly situated and qualified their rights and guarantees under the Constitu-[fol. 327] tions and laws of the United States of America and of the State of Texas. Plaintiff's request was denied and his plan and guideline rejected.

9.

Thereafter, on the 31st day of August, 1963, the Defendants Gideon, Bryant, Moreland, Osborne, and Culver, or a majority thereof, constituting and acting as the members of the Commissioners' Court of Midland County, Texas, passed and approved an Order of said Commissioners' Court, dividing and redistricting Midland County into four

new County Commissioners' Precincts, the boundaries of said new Precincts to become effective on the 1st day of January, 1964. The Defendants Gideon, Bryant, Moreland, and Osborne voted in favor of the passage and approval of such Order; the Defendant Culver was present and presiding, but did not vote. Said Order made only insignificant changes in the boundaries of the old County Commissioners' Precincts, in no way corrected or lessened the great disparity in population, qualified voters, land area, assessed value of taxable property, miles of County roads, and other pertinent things among the Commissioners' Precincts of the County. Said Order was and is impractical and inconvenient to the people of Midland County, and deprives Plaintiff and others similarly situated of their equal rights with other residents, qualified voters and taxpayers of Midland County, abridges their privileges and immunities as citizens, denies to them equal protection and due process of the law, and, in effect, deprives them of the right of franchise. Under the facts and circumstances and for the reasons hereinafter set forth, all of which were and are well known to Defendants, in passing and approving said Order on August 31, 1963, Defendants Gideon, [fol. 328] Bryant, Moreland, and Osborne acted arbitrarily, capriciously, unreasonably, unfairly, improperly, wrongfully, without regard for the convenience of the people of Midland County or the rights, privileges, and guarantees of Plaintiff and others similarly situated, and in gross abuse of their discretion.

10.

Immediately prior to the passage of said Order, Midland County had a population of approximately 70,000 persons distributed among the Commissioners' Precincts then in effect approximately as follows:

APPROXIMATE POPULATION, BEFORE 8/31/1963

Precinct No. 1	Precinct No. 2	Precinct No. 3	Precinct No. 4
68,508	298	414	780
(97.87%)	(.43%)	(.59%)	(1.11%)

11.

At the time of the passage of said Order and at all times since, Midland County has had a population of approximately 70,000 persons, distributed among the Commissioners' Precincts established by such Order approximately as follows:

APPROXIMATE POPULATION, AFTER 8/31/63

Precinct No. 1	Precinct No. 2	Precinct No. 3	Precinct No. 4
67,906 (97.01%)	852 (1.22%)	414 (.59%)	828 (1.18%)

12.

Immediately prior to the passage of said Order, Midland County had 15,554 qualified voters, distributed among the Commissioners' Precincts then in effect as follows:

[fol. 329]

QUALIFIED VOTERS, BEFORE 8/31/1963

Precinct No. 1	Precinct No. 2	Precinct No. 3	Precinct No. 4
15,238 (97.97%)	89 (.58%)	107 (.68%)	120 (.77%)

13.

From the time of the passage of said Order until the 1st day of February, 1964, Midland County had 15,554 qualified voters, distributed among the Commissioners' Precincts established by such Order approximately as follows:

APPROXIMATE NUMBER OF QUALIFIED VOTERS, AFTER 8/31/1963

Precinct No. 1	Precinct No. 2	Precinct No. 3	Precinct No. 4
15,137 (97.32%)	188 (1.21%)	107 (.69%)	122 (.78%)

14.

On the 1st day of February, 1964 and at all times since, Midland County has had 25,609 qualified voters, distributed among the Commissioners' Precincts established by such Order as follows:

APPROXIMATE NUMBER OF QUALIFIED VOTERS, 2/1/1964 TO DATE

Precinct No. 1	Precinct No. 2	Precinct No. 3	Precinct No. 4
24,945	265	150	249
(97.40%)	(1.04%)	(.59%)	(.97%)

15.

Immediately prior to the passage of said Order, Midland County had a total land area of approximately 900 square miles, distributed among the Commissioners' Precincts then in effect approximately as follows:

APPROXIMATE LAND AREA IN SQUARE MILES, BEFORE 8/31/1963

Precinct No. 1	Precinct No. 2	Precinct No. 3	Precinct No. 4
231	113	301	255
(26%)	(13%)	(33%)	(28%)

[fol. 330]

16.

At the time of the passage of said Order and at all times since, Midland County has had a total land area of approximately 900 square miles, distributed among the Commissioners' Precincts established by such Order approximately as follows:

APPROXIMATE LAND AREA IN SQUARE MILES, AFTER 8/31/1963

Precinct No. 1	Precinct No. 2	Precinct No. 3	Precinct No. 4
110	172	313	305
(12%)	(19%)	(35%)	(34%)

17.

Immediately prior to the passage of said Order, Midland County had a total assessed valuation of taxable property of $111,480,550.00, distributed among the Commissioners' Precincts then in effect approximately as follows:

APPROXIMATE ASSESSED VALUATION, BEFORE 8/31/1963

Precinct No. 1	Precinct No. 2	Precinct No. 3	Precinct No. 4
$71,347,552 (64%)	$13,377,660 (12%)	$13,377,660 (12%)	$13,377,660 (12%)

18.

At the time of the passage of said Order and at all times since, Midland County has had a total assessed valuation of taxable property of $111,405,970, distributed among the Commissioners' Precincts established by such Order approximately as follows:

APPROXIMATE ASSESSED VALUATIONS, AFTER 8/31/1963

Precinct No. 1	Precinct No. 2	Precinct No. 3	Precinct No. 4
$67,957,641 (61%)	$14,482,776 (13%)	$14,482,776 (13%)	$14,482,776 (13%)

19.

At the time of the passage of said Order and at all times [fol. 331] since, many other things, such as miles of County roads, allocation of County funds and revenues, percentage of market value of taxable property assessed for taxation, and many others relating to the status, function, and operation of Midland County, were and are grossly disproportionate and unequal among the Commissioners' Precincts of said County.

20.

Under the division of Midland County into Commissioners' Precincts by the Order of 1898, as modified by the

Order of 1901, and by the Order of August 31, 1963, a majority of the Defendants, their predecessors and successors, were, are, and will continue to be elected by and answerable to less than 3% of the qualified voters of Midland County. As a result, and for the purpose of perpetuating themselves in office, the Defendants or a majority thereof, their predecessors and successors, acting as the Board of Equalization of Midland County, have and will continue to value for State and County tax purposes all taxable property in Commissioners' Precincts No. 2, No. 3, and No. 4 at an average of approximately 8% of its fair market value and all taxable property in Commissioner's Precinct No. 1 at an average of approximately 18% of its fair market value. Such arbitrary and unlawful action has and will continue to result from the abuse of discretion of Defendants in failing and refusing to divide Midland County into Commissioners' Precincts with each having as nearly as possible and practicable an equal number of people and qualified voters, all to the inconvenience of the vast majority of the people of Midland County and in deprivation and denial of Plaintiff's rights, privileges, and guarantees under the Constitutions and laws of the United States of America and the State of Texas.

[fol. 332] 21.

Article 5, Section 18 of the Constitution of Texas provides in part that each organized County in the State shall be divided from time to time, for the convenience of the people, into four Commissioners' Precincts and that such division shall be made by the Commissioners' Court of the County. Under the facts and circumstances and for the reasons herein set forth, the Order of the Commissioners' Court of Midland County on August 31, 1963, dividing said County into Commissioners' Precincts was not and is not practical, was not and is not convenient to the people of Midland County and, in passing and approving said Order the Defendants Gideon, Bryant, Moreland and Os-

borne acted arbitrarily, capriciously, unreasonably, unfairly, and wrongly and grossly abused their discretion.

22.

Plaintiff would further show unto the Court that the term "for the convenience of the people" contained in Article 5, Section 18 of the Constitution of the State of Texas, when construed with the provisions of said Article 5, Section 18 as a whole and with Article 1, Sections 1, 2, 3 and 19, of the Constitution of the State of Texas and the Fourteenth Amendment, Section 1, of the Constitution of the United States of America, requires that a County Commissioners' Court shall, as the occasion and facts demand, divide a County into Commissioners' Precincts having as nearly as possible and practicable an equal number of people and qualified voters. This the Order passed and approved by Defendants Gideon, Bryant, Moreland and Osborne on August 31, 1963, failed to do, though the occasion and facts demanded such a division and though same was in all things practicable and possible.

[fol. 333] 23.

Plaintiff would further show unto the Court that the Order of the Commissioners' Court of Midland County dividing said County into Commissioners' Precincts, passed and approved by Defendants Gideon, Bryant, Moreland and Osborne on August 13, 1963, deprives him and others similarly situated of their rights, liberties, privileges, and guarantees under the Constitutions and laws of the United States of America and of the State of Texas. Under the division made by said Order, the County Commissioners of Precincts No. 2, No. 3, and No. 4 will continue to be elected by less than 3% of the qualified voters of the County and said three Commissioners, constituting a majority of the Commissioners' Court, will continue to represent Commissioners' Precincts having a combined population of less than 3% of Midland County's total population,

while the County Commissioner of Precinct No. 1, the Precinct of Plaintiff's residence, will continue to be elected by more than 97% of the qualified voters of the County and will continue to represent a Commissioner's Precinct having more than 97% of Midland County's total population. Because great disparity in population and qualified voters among the Commissioners' Precincts exists and will continue to exist under said Order, Plaintiff is and will continue to be subjected to invidious and unjust discrimination; his voice as a citizen is and will continue to be diluted; and his vote as a qualified voter of Commissioner's Precinct No. 1, Midland County, Texas, is and will continue to be debased. For such reasons, said Order is repugnant to the Fourteenth Amendment, Section 1, of the Constitution of the United States of America and Article 1, Sections 3 and 19 of the Constitution of the State of Texas in that it abridges Plaintiff's privileges and im- [fol. 334] munities as a citizen, deprives him of due process of law, denies to him equal protection of the law, deprives him of equal rights with other citizens of Midland County and of privileges and immunities without due course of law.

24.

Plaintiff would further show unto the Court that under the provisions of Article 5, Section 8 of the Constitution of the State of Texas this Court has full power and authority to grant to Plaintiff the relief sought herein.

Wherefore, premises considered, Plaintiff prays that Defendants be cited to appear herein and that upon final hearing Plaintiff have judgment as follows:

(a) That the Defendants Gideon, Bryant, Moreland, and Osborne, constituting a majority of the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of their discretion in passing and approving the Order of August 31, 1963, dividing Midland

County into Commissioners' Precincts and that said Order, and all prior Orders dividing said County into Commissioners' Precincts, be set aside and that said Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, be directed to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people.

(b) In the alternative, that the Defendants Gideon, Bryant, Moreland, and Osborne, constituting a majority of the members of said Commissioners' Court, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of their discretion in passing and approving the Order of August 31, 1963, dividing Midland County into Commissioners' Precincts and that said Order, and [fol. 335] all prior Orders dividing said County into Commissioners' Precincts, be set aside and that said Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, be directed to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people, giving proper consideration to equality of population, qualified voters, land area, tax values, miles of County roads, and other pertinent things among said Commissioners' Precincts.

(c) In the alternative, that the Defendants Gideon, Bryant, Moreland and Osborne, constituting a majority of the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly, and wrongfully and in gross abuse of their discretion in passing said Order and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that writ of mandamus issue compelling the Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing to establish, as nearly as possible and practicable, such Precincts so that each will have substantially the same

number of people, qualified voters, square miles, and other pertinent things.

(d) In the alternative, that the Defendants Gideon, Bryant, Moreland, and Osborne, constituting the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of their discretion in passing said Order and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that writ of mandatory injunction issue restraining and enjoining [fol. 336] the Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court from continuing said Order in effect or calling or conducting any election thereunder and directing said Defendants to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing to establish, as nearly as possible and practicable, such Precincts so that each will have substantially the same number of people, qualified voters, square miles, and other pertinent things.

(e) In the alternative, that the Order of said Defendants on August 31, 1963, dividing Midland County into Commissioners' Precincts was and is repugnant to and in conflict with one or more of the following: The Fourteenth Amendment, Section 1, of the Constitution of the United States of America and Article 1, Sections 1, 2, 3, and 19, of the Constitution of the State of Texas, for the reason that it deprives Plaintiff and others similarly situated of their constitutional rights, privileges, liberties, and guarantees, and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that said Defendants, as members of the Commissioners' Court be directed to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing to establish, as nearly as practicable and possible, such Precincts so that each will have substantially the same number of people and qualified voters.

(f) And for costs of suit and for such other relief, general or specially, in law or in equity, to which Plaintiff may show himself justly entitled.

Wm. A. Olson, Vinson, Elkins, Weems & Searls, Attorneys for Plaintiff, First City National Bank Building, Houston 2, Texas.

[fol. 337] *Duly sworn to by Hank Avery, jurat omitted in printing.*

Proof of Service (omitted in printing).

[fol. 338] [File endorsement omitted]

[fol. 179]

IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS

142ND JUDICIAL DISTRICT

No. 18018

HANK AVERY,

v.

EDWARD N. GIDEON, et al.

FIFTH AMENDED ORIGINAL ANSWER OF ALVEY A. BRYANT, CLARK MORELAND AND LOUIS OSBORNE—Filed May 18, 1964

To the Honorable Judge of Said Court:

Pleas in Abatement and Motions to Dismiss

Now Come Alvey A. Bryant, Clark Moreland and Louis Osborne, defendants in the above styled and numbered cause, and in response to plaintiff's sixth amended original petition, separately and conjunctively repeat, renew, again

allege and incorporate by reference as if set out in full herein, each and all of the matters and statements contained in all of their motions to dismiss and pleas in abatement heretofore filed in this cause, and resubmit the same to the Court, and renew and preserve each and all of their exceptions to the rulings of the Court thereon.

Wherefore, defendants again pray that each of such motions to dismiss and pleas in abatement be in all things sustained.

Respectfully submitted,

Stubbeman, McRae, Sealy & Laughlin, By Frank Stubbeman, F. H. Pannill, W. B. Browder, Jr.

[fol. 180]
State of Texas)
County of Midland)

Before Me, the undersigned authority, on this day personally appeared F. H. Pannill, who, being by me first duly sworn, on oath deposes and says that he is one of the attorneys for the above named defendants in the above styled and numbered cause and that all of the matters and things alleged and set out in the pleas in abatement and motions to dismiss referred to above are in all things true and correct.

F. H. Pannill

Subscribed and Sworn to before me this 18th day of May, 1964.

Antoinette M. Welsh, Notary Public in and for Midland County, Texas.

Special Exception and Motion for Judgment

Now Come the above named defendants and specially except to plaintiff's petition and plaintiff's asserted cause of action because it is established by the allegations of plain-

tiff's petition and the record herein that plaintiff has no cause of action and judgment should be entered against him, for the following reasons:

1.

The record before the court is now as follows:

a. Plaintiff's sixth amended original petition.

b. True, correct and certified stenographic transcript of proceedings at redistricting hearings, which is attached to these defendants' Fourth Amended Original Answer on [fol. 181] file herein and referred to in Defendants' said answer and incorporated herein by reference.

c. Minutes of the defendant Commissioners Court of Midland County, Texas, of meeting of July 8, 1963, July 23, 1963, July 25, 1963, August 13, 1963 and August 27, 1963, showing motions, votes and deliberations on the matter of redistricting, which are, in fact, pleaded by plaintiff and attached hereto and here referred to by defendants.

d. Order entered on August 31, 1963, altering, changing and fixing the boundary lines of Commissioners Precincts in Midland County, Texas, which is pleaded by plaintiff and attached hereto as a part hereof.

Collectively, said records show that the plaintiff appeared before the Commissioners Court of Midland County, Texas, on or about September 24, 1962, and presented a written petition requesting that Midland County be divided into four equally populated county commissioners precincts; that plaintiff called no witnesses, offered no evidence, presented no plan and submitted no facts to show that such division was within the power and jurisdiction of the members of the Commissioners Court as being for the convenience of the people; and that the Commissioners Court then and on that day by a majority vote refused and denied plaintiff's petition and that on the same day this plaintiff filed his original petition in this cause.

3.

Said records further show that during July, 1963, after stating their intention so to do in open court in a pretrial hearing in this cause, the Commissioners Court of Midland County, Texas, by unanimous vote, called and ordered a series of public hearings on the question or issue of redistricting the commissioners' precincts. The records further show that such hearings were had at which a large number of citizens appeared pro and con on the issue of redistrict- [fol. 182] ing, and those favoring redistricting offered a variety of plans, proposals and requests to accomplish their respective aims. The records further show that thereafter the Commissioners Court in public and open session entered into a series of deliberations, debates and discussions on such matter, at the conclusion of which the Commissioners' Court by unanimous vote adopted and ordered a change and alteration in the commissioners' precinct districting, all as pleaded by plaintiff, and as set out in the answer of these defendants.

4.

Said records further show that this plaintiff has been accorded due process of law in all matters pertaining to his request for redistricting; that a full, fair and open public hearing has been held at which this plaintiff and all others interested were permitted every opportunity to express their views and present such evidence as they might deem material on the question before the court; and that the members of the court have diligently and conscientiously deliberated and considered all the facts, statements and requests made of them and have unanimously come to a conclusion as to a division of the county commissioners' precincts which is for the convenience of the people of the county. Therefore, said records show that there has been no infringement or denial of the rights of this plaintiff or anyone else.

5.

Said records also show that the matters submitted to the Commissioners Court in connection with such hearing were sharply divided and conflicting and controverted, and that the order and decision of the Commissioners Court is supported by substantial evidence. Defendants would, therefore, say that the supervisory and appellate jurisdiction of this court as to orders of the Commissioners Court is limited to determining whether such Commissioners Court [fol. 183] orders are supported by substantial evidence, and that if they are, it is the duty of this court to affirm and validate the same. The records show on their face that there is no genuine issue of material fact as to this matter, and that, as a matter of law, the order, judgment and decision of the Commissioners Court changing and defining the boundaries of the county commissioners' precincts is supported by substantial evidence and should not be disturbed by this Honorable District Court.

Premises Considered, defendants move the Court to enter judgment for defendants and against plaintiff on the pleadings and record now made and before the court.

Answer

Now Come the above named defendants, without waiving but still insisting upon each and all of their motions to dismiss and pleas in abatement and their Special Exception and Motion to Dismiss hereinabove filed, and, subject thereto, make this their answer to plaintiff's Sixth Amended Original Petition, and in support thereof show the court as follows:

I

Defendants specially except to all of the allegations of paragraphs 4, 5 and 6 of said petition and say the same are insufficient in law because such allegations consist solely of population statistics and voting statistics in Midland County, and various portions thereof, all of which are wholly irrelevant and immaterial to plaintiff's purported

cause of action for the reason that there is no duty on the Commissioners Court to divide the county into equally populated commissioners' precincts.

Of which special exception, defendants pray judgment of the court that each of said paragraphs be stricken from the petition.

[fol. 184]

II

Defendants specially except to the allegations of paragraphs 7 and 8 of said petition and say the same are insufficient in law because the same fail to allege any facts which show that the division of county commissioners' precincts is injurious or harmful or inconvenient to plaintiff or to any other person affected thereby and fail to state or show that plaintiff's purported plan or guideline for division of the county was or would be beneficial, helpful or convenient, or even desirable, to the people of Midland County, Texas. The allegations of said paragraphs constitute merely conclusions of the pleader, and expressions of the plaintiff's preferences, all of which are wholly immaterial to any issue in this cause.

Of which special exception, defendants pray judgment of the court ordering such paragraphs stricken.

III

Defendants specially except to paragraph 9 of said petition and say the same is insufficient in law because the same fails to state or show facts which impose on the County Commissioners any duty to divide the county into commissioners' precincts which are equal, or nearly equal, in population, qualified voters, land area, value of taxable property, miles of road or any other matters, the only duty of the Commissioners Court being to divide the county into commissioners' precincts which are convenient to the people, and thus said paragraph states merely conclusions of the pleader and the personal preferences of the plaintiff, all of which are wholly irrelevant and immaterial to this controversy.

IV

Defendants specially except to the allegations of paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 of said petition and say the same are insufficient in law for the same reasons and on the same grounds as set out above in paragraph I of this answer.

[fol. 185] V

Defendants specially except to the allegations of paragraph 20 of said petition which complain of the methods of ad valorem taxation and valuation of properties in the county for such purposes, and say the same are insufficient and improper in law because the plaintiff fails to show that he has any standing in this Court to pursue on behalf of all residents of the county a taxpayer suit to review the method or system of ad valorem taxation in use in this county, because if such allegations remain in the petition the tax assessor-collector is a necessary and indispensable party to the suit, and because plaintiff has failed to show any financial or monetary loss personal or particular to him as a result of the alleged discrimination and wrongful imposition and handling of such taxation, all of which has been made the subject of prior special exception heretofore sustained by the Court and here renewed.

Of which special exception, defendants pray judgment of the Court ordering such allegations and said paragraph stricken from the petition.

VI

Defendants specially except to the allegations of paragraph 22 of said petition that the Constitutions of the United States and Texas require the county to be divided into precincts of an equal number of people and qualified voters, and say the same is insufficient and improper in law because the provisions of the Constitution of Texas and the Constitution of the United States referred to therein do not require that quasi judicial and administrative officials such

as county commissioners be elected from areas which are equal in population or voter strength, all of which has been made the subject of a prior special exception which has been sustained by the court and which is here repeated and renewed.

[fol. 186]

VII

Defendants specially except to the allegations of paragraph 23 of said petition and say the same is insufficient in law for the same reasons and on the same grounds as set out in the foregoing paragraph VI of this answer.

VIII

Defendants specially except to the allegations of paragraphs 7, 8, 22 and 23 of said petition which refer to the Fourteenth Amendment of the Constitution of the United States of America, and say that each and all of said allegations are insufficient and improper in law because the subdivision of Midland County into commissioners' precincts is not affected, controlled or governed by said Fourteenth Amendment to the United States Constitution, in that said amendment to said Constitution does not require that Midland County be divided into commissioners' precincts of numerical equality or substantial numerical equality or nearly substantial numerical equality, all of which has been made the subject of the prior special exceptions which have been sustained by the court and which are here repeated and renewed.

Of which special exception defendants pray judgment of the court ordering each of those allegations of said Fourteenth Amendment of the Constitution of the United States appearing in said paragraphs 7, 8, 22 and 23 be stricken from the petition.

IX

Defendants specially except to paragraph 24 of said petition and the prayer for relief therein stated, and say that:

(1) As to subparagraphs (a) and (b), the same request relief which is moot, hypothetical and not justiciable because plaintiff's petition shows on its face that the defendants have already complied with the order here requested and have divided the county into [fol. 187] commissioners' precincts for the convenience of the people;

(2) That as to subparagraph (c), plaintiff's petition shows on its face that this court has no jurisdiction to revise or amend the Constitution of the State of Texas by imposing conditions on the exercise of discretion by these defendants other than those stated in the Constitution, and it has no jurisdiction to prescribe or direct the factors, and the relative weight to be given to the factors, entering into such exercise of discretion;

(3) As to subparagraph (d), plaintiff's petition shows on its face that the same is moot, hypothetical, and not justiciable, because the order of which plaintiff complains was entered on August 31, 1963, to become effective January 1, 1964, and has become effective and elections have been called, voters have been registered, candidates have announced for office and been nominated for office in primary elections subject to such order; and

(4) That as to subparagraph (e), the request for relief made is beyond the jurisdiction of this court for the reasons heretofore set out in this paragraph.

X

Further answering, defendants deny each and every, all and singular, the allegations of plaintiff's petition and demand strict proof of the same.

[fol. 188]

XI

Further answering, defendants say that the order and decision entered by the Commissioners' Court of Midland

County, Texas, on August 31, 1963, was the result of public hearings at which a full and adequate opportunity to be heard was given to plaintiff and all others who appeared, and that such decision was reached after due deliberation based on a record which shows that there is substantial evidence to support such order, and that this plaintiff has no right or standing in this court to require or request that there be set aside an order which is supported by substantial evidence.

XII

Further answering, defendants say that plaintiff's claim for relief is hypothetical and not justiciable, being a political question committed by the Constitution to the discretion of the Commissioners Courts, validly and conscientiously exercised, and that plaintiff's petition shows on its face that such discretion has been validly and conscientiously exercised, and that plaintiff's claim for relief should be denied.

XIII

Further answering, defendants say that not until long after said order of August 31, 1963, has been passed and published, and had been put into effect, and elections called. voters registered and candidates announced and nominated for office under such order, did plaintiff take any steps to have the same reviewed, adjudicated or set aside by this District Court, and that, under such circumstances, plaintiff's time for a direct attack has long since passed and he is estopped to assert the same, and that therefore plaintiff's present petition constitutes a collateral attack on a valid and subsisting and effectuated order of the Commissioners Court of Midland County, Texas, in a proceeding in rem of [fol. 189] which it has jurisdiction, and such collateral attack is barred and prohibited by the doctrines of res judicata and estoppel by judgment, as well as by the law of laches and stale demand.

Wherefore, defendants pray that plaintiff take nothing by his suit and that these defendants go hence with their costs.

Respectfully submitted,

Stubbeman, McRae, Sealy & Laughlin, By Frank Stubbeman, F. H. Pannill, W. B. Browder, Jr., P. O. Box 670, Midland, Texas, Attorneys for Defendants Alvey A. Bryant, Clark Moreland and Louis Osborne.

[fol. 190]

EXHIBIT D2

BE IT REMEMBERED THAT ON THIS 8TH DAY OF JULY A.D. 1963 THERE CAME ON TO BE HELD IN THE COURTHOUSE OF MIDLAND COUNTY, TEXAS A REGULAR SESSION OF THE HONORABLE COMMISSIONERS' COURT. THOSE PRESENT BEING:

BARBARA G. CULVER, County Judge
EDWARD N. GIDEON, Commissioner, Precinct No. 1
ALVEY A. BRYANT, Commissioner, Precinct No. 2
CLARK MORELAND, Commissioner, Precinct No. 3
LOUIS OSBORNE, Commissioner, Precinct No. 4
ROSENELLE CHERRY, County Clerk

Motion by Commissioner Bryant, seconded by Commissioner Gideon, and all voting in favor to adopt the following resolution:

It is believed that open hearings should be conducted to determine whether the present Commissioners' precincts are for the convenience of the people as required by the Texas Constitution, or whether other Commissioners' precincts for the convenience of the people should be prescribed by this Commissioners' Court. This situation is presented in view of the fact that Mr. Hank Avery, Mayor of the City of Midland, has heretofore filed a suit in the District Court of this County to compel a redistricting of the County according to population; the Commissioners from Precincts

2, 3 and 4 have their own attorneys in this case, and their attorneys have presented to the District Court (a) a plea that Midland County is a necessary party to the case, and such plea has been sustained, (b) Special Exceptions to delete claims of discrimination in tax valuation, and these Exceptions have been sustained, (c) An Answer in opposition to Mayor Avery's Motion for Summary Judgment, and it has been sustained, and (d) Special Exceptions that the claim of the Mayor of a Republican form of government should be deleted, and this has been sustained; and (e) Special Exceptions that the Fourteenth Amendment of the United States Constitution does not require the County to be divided according to population, and this has been sustained. Further, the Attorneys for the Commissioners of Precincts 2, 3 and 4 have also presented a Motion for Partial Summary Judgment that the redistricting requests [fol. 191] heretofore made are too vague and general to require this Court to entertain such requests, but the District Judge has refused to sustain this Motion, so that the Attorneys stated to the District Judge in open Court that if the Motion were refused they would advise the members of the Commissioners' Court that they should consider any objections to the present districting or request for a redistricting.

In view of these rulings and decisions of the District Court, this Commissioners' Court understands that the only matter which it is to consider is whether the present Commissioners' precincts are for the convenience of the people and whether other proposed precincts would be for the convenience of the people; therefore,

BE IT RESOLVED by the Commissioners' Court of Midland County, Texas, that a special meeting of the Commissioners' Court be called for Tuesday, July 23, 1963, commencing at 10:00 o'clock A.M., at which time the Commissioners' Court will hear the evidence of Mayor Hank Avery and all others who care to attend as to any inconvenience to the people resulting from the present Commissioners' precincts, with such hearing to continue and be recessed

from day to day until all such evidence offered has been received and heard;

BE IT FURTHER RESOLVED that a special meeting of the Commissioners' Court be scheduled for Tuesday, August 13, 1963, commencing at 10:00 o'clock A.M., at which time the Commissioners' Court will hear the evidence of any person opposing a redistricting of Midland County, such hearing to be continued and recessed from day to day until all of that evidence has been heard and considered by the Court and

BE IT FURTHER RESOLVED that the Commissioners' Court reserve to a later time but before October 22, 1963 if possible, a decision as to when to vote on whether there is to be a redistricting of Midland County and to vote on the plan for redistricting if it is decided to change any of the present precinct boundaries.

This resolution to be entered in full in the Minutes of this Court.

THE STATE OF TEXAS)
COUNTY OF MIDLAND)

I, ROSENELLE CHERRY, Clerk of the County Court in and for Midland County, Texas, do hereby certify that the above and foregoing is a full, true and correct copy of a Motion at a regular session of the Honorable Commis- [fol. 192] sioners' Court as recorded in Volume 8, Page 229, of the COMMISSIONERS' COURT MINUTES of Midland County, Texas.

WITNESS my hand and seal of the County Clerk at Midland, Texas, this the 14th day of May, A.D., 1964.

ROSENELLE CHERRY, CLERK,
COUNTY COURT,
MIDLAND COUNTY, TEXAS
BY: IRENE MORRIS, Deputy

[fol. 193]

BE IT REMEMBERED THAT ON THIS THE 23RD DAY OF JULY, A.D. 1963 THERE CAME ON TO BE HELD IN THE COURTHOUSE OF MIDLAND COUNTY, TEXAS A SPECIAL SESSION OF THE HONORABLE COMMISSIONERS' COURT. THOSE PRESENT BEING:

BARBARA G. CULVER, County Judge
EDWARD N. GIDEON, Commissioner, Precinct No. 1
ALVEY A. BRYANT, Commissioner, Precinct No. 2
CLARK MORELAND, Commissioner, Precinct No. 3
LOUIS OSBORNE, Commissioner, Precinct No. 4
ROSENELLE CHERRY, County Clerk

9:30 A.M.

In the County Judge's office and in the absence of an official call for a commissioners' Court meeting and not at a public place Commissioner Bryant presented the following Rules of Procedure for consideration of the court for the Public Hearing on Re-Districting of Midland County. Said Rules being as follows:

RULES OF PROCEDURE FOR HEARING IN COMMISSIONERS COURT

1. The Texas Rules of Civil Procedure will apply to proceeding where applicable.

2. No cameras or recording devices will be permitted in the hearing room while hearings are in progress.

3. No applause or other demonstrations from spectators or persons in the hearing room will be permitted.

4. Each person desiring to present any testimony shall be sworn and shall speak for himself or herself and not purport to speak for members of any organization. This shall not preclude any person from having a statement made or presented to the Court through an attorney.

5. Each attorney in the redistricting case pending in the District Court shall be permitted to question each person who appears to give testimony.

6. The order of the proceedings, including rulings on questions and evidence, shall be made by the County Judge but in case of exclusion of any evidence or testimony, the party offering the same may appeal to the entire Court for a ruling on admissibility.

7. Each person appearing shall have his or her attention directed to the order and ruling of the District Court that the Commissioners' Court is not under any duty to divide the county on a basis of equal population. County Judge [fol. 194] Culver read over the rules and stated "I will have no part in this attempt to hamstring the public hearings. I am the presiding officer of this court, prepared to preside over the public hearings, which have been called this morning. I do not want to be bound by these proposed rules which are designed to defeat the purpose of the meetings." Judge Culver then went to the County Courtroom in compliance with the call for the public hearings adopted by the Commissioners' Court.

9:55 A.M.

All Commissioners convened in the Commissioners' Court room and notified Judge Culver they were meeting. Judge Culver declined to attend due to Public Hearing scheduled for 10:00 A.M. in the County Courtroom. Commissioner Osborne was appointed Judge Pro Tem. Motion was made by Commissioner Moreland seconded by Commissioner Bryant to recess for one hour to determine if the County Judge or the majority of the Commissioners' Court would rule.

10:00 A.M.

Judge Culver proceeded to hold the Public Hearing in the County Court room on re-districting of Midland County. Commissioners Bryant, Moreland and Osborne were absent and Commissioner Gideon was present for the public hearing.

The following people were heard, favoring re-districting of Midland County: H. C. Avery, Mrs. Darol Ramey, Tom

Culbertson, Bob Young, Mrs. Virginia Kimmey, Warren Chapman, Wm. A. Heck, K. C. Slough, Grady White, H. Edward Lindsley, Mrs. J. H. Walters, W. A. Waldschmidt, Ray Herndon and Kamilla H. Key. Various plans were presented by these people and they are on file in the County Judge's Office. This meeting was recessed until 1:30 on July 23, 1963.

11:00 A.M.

Commissioner Moreland went to the County Courtroom and stated to Judge Culver "I request and move a meeting be had in the Commissioners' Court room with just the court members present to work out rules of procedure as I have previously told you I am against hearings where cameras and T.V.s and demonstrations from the crowd prevent an impartial hearing and exercise of discretion. This motion was seconded by Commissioner Bryant and [fol. 195] Commissioner Osborne voted in favor.

1:00 P.M.

The Commissioners' Court convened in the Commissioners' Court room with all members present. After much discussion Motion was made by Commissioner Bryant, seconded by Commissioner Moreland to adopt the following Rules of Procedure for the Public hearing on re-districting of Midland County. Said rules being as follows:

RULES OF PROCEDURE FOR PUBLIC HEARING IN COUNTY COMMISSIONERS COURT ADOPTED JULY 23, 1963

1. No applause or other demonstrations or straw votes will be permitted from spectators or persons in the hearing room.

2. Each person desiring to present any testimony shall be sworn if he chooses to be sworn. Any person who has been sworn will be given the option of being cross-examined by the attorneys. Persons wishing to make a statement

or ask a question will be heard whether or not they elect to be sworn.

3. One attorney for each side in the redistricting case pending in the District Court shall be permitted to question each person who has been sworn and who agrees to submit to cross-examination.

Commissioner Osborne voted aye and Commissioner Gideon voted Nay.

1:30 P.M.

The public hearing on Re-districting Midland County reconvened at 1:30 in the County Courtroom with the entire Commissioners Court present. It was agreed that proceedings held in the morning would be made part of the record and each person given an opportunity to present his views again. After hearing the same people that were heard in the morning this hearing was adjourned until July 25, 1963 at 1:30 P.M.

3:00 P.M.

The Public Hearing on Re-Districting of Midland County re-convened at 1:30 P.M. on July 25, 1963 in the County Court room. The following people were heard: H. C. Avery Jr., Mrs. C. M. Linehan, Wm. L. Adam, Paul E. Fitz-
[fol. 196] gerald, Mrs. W. W. Crofton, Mrs. Elizabeth Leggett, L. A. Kuykendall and Joe C. Davis. The meeting was recessed until 10:00 A.M. on July 31, 1963.

The Public Hearing on Re-Districting of Midland County re-convened at 10:00 A.M. on July 31, 1963 in the County Court room with all members of the Commissioners' Court present. The following people were heard in favor of redistricting: L. A. Kuykendall, Tom Barnes, Louis H. Anderson, Bruce Vernor, William A. Heck and H. C. Avery Jr. The meeting was adjourned.

[fol. 197]
THE STATE OF TEXAS)
COUNTY OF MIDLAND)

I, ROSENELLE CHERRY, Clerk of the County Court in and for Midland County, Texas, do hereby certify that the above and foregoing is a true and correct copy of a portion of the minutes of a SPECIAL SESSION OF THE HONORABLE COMMISSIONERS' COURT as recorded in Volume 8, Page 232A, of the COMMISSIONERS' COURT MINUTES of Midland County, Texas.

WITNESS my hand and seal of the County Clerk at Midland, Texas, this the 14th day of May, A.D., 1964.

ROSENELLE CHERRY, CLERK,
COUNTY COURT
MIDLAND COUNTY, TEXAS
BY /s/ IRENE MORRIS, Deputy

[fol. 198]
THE STATE OF TEXAS)
COUNTY OF MIDLAND)

I, ROSENELLE CHERRY, Clerk of the County Court in and for Midland County, Texas do hereby certify that the above and foregoing is a full, true and correct copy of MINUTES of the Honorable Commissioners' Court as recorded in Volume 8, Page 235, of the COMMISSIONERS' COURT MINUTES of Midland County, Texas.

WITNESS my hand and seal of the County Clerk at Midland, Texas, this the 14th day of May, A.D., 1964.

ROSENELLE CHERRY, CLERK,
COUNTY COURT
MIDLAND COUNTY, TEXAS
BY /s/ IRENE MORRIS, Deputy

[fol. 199]

BE IT REMEMBERED THAT ON THIS THE 13TH DAY OF AUGUST A.D. 1963 THERE CAME ON TO BE HELD IN THE COURTHOUSE OF MIDLAND COUNTY, TEXAS, A SPECIAL SESSION OF THE HONORABLE COMMISSIONERS' COURT. THOSE PRESENT BEING:

BARBARA G. CULVER, County Judge
EDWARD N. GIDEON, Commissioner, Prec. 1
ALVEY A. BRYANT, Commissioner, Prec. 2
CLARK MORELAND, Commissioner, Prec. 3
LOUIS OSBORNE, Commissioner, Prec. 4
ROSENELLE CHERRY, County Clerk

A public hearing was held in the District Courtroom on Re-districting of Midland County with the following people speaking against the re-districting: Frank Bezoni, Rev. Ross Payne, Ben Golladay, N. J. Bell, Eugene Jones, Harry Coleman, Roy Parks, Murray Fasken, N. A. Bergstrom, T. C. Tubb, P. F. Bridgewater, Foy Proctor, George Glass, Marion Flynt, Bob Preston, Gale Pugh, Kenneth Parker, Louis Bartha, Clarence Scharbauer and Henry Brunson.

Motion by Commissioner Bryant, seconded by Commissioner Moreland, and all voting in favor to adjourn the public hearing on re-districting.

ATTEST /s/ ROSENELLE CHERRY, County Clerk

/s/ BARBARA G. CULVER, County Judge

THE STATE OF TEXAS)
COUNTY OF MIDLAND)

I, ROSENELLE CHERRY, Clerk of the County Court in and for Midland County, Texas, do hereby certify that the above and foregoing is a full, true and correct copy of the Minutes at a SPECIAL SESSION of the HONORABLE COMMISSIONERS' COURT as recorded in Volume 8, Page 241 of the COMMISSIONERS' COURT MINUTES of Midland County, Texas.

WITNESS my hand and seal of the County Clerk at Midland, Texas, this the 14th day of May, A.D., 1964.

ROSENELLE CHERRY, CLERK,
COUNTY COURT
MIDLAND COUNTY, TEXAS
BY /s/ IRENE MORRIS, Deputy

BE IT REMEMBERED THAT ON THIS THE 27TH DAY OF AUGUST A.D. 1963 THERE CAME ON TO BE HELD IN THE COURTHOUSE OF MIDLAND COUNTY, TEXAS A SPECIAL SESSION OF THE HONORABLE COMMISSIONERS' COURT. THOSE PRESENT BEING:

BARBARA G. CULVER, County Judge
EDWARD N. GIDEON, Commissioner, Prec. 1
ALVEY A. BRYANT, Commissioner, Prec. 2
CLARK MORELAND, Commissioner, Prec. 3
LOUIS OSBORNE, Commissioner, Prec. 4
ROSENELLE CHERRY, County Clerk

Motion by Commissioner Gideon to adopt his plan as submitted in regular meeting on August 26, 1963 for re-districting Commissioners' Precincts in Midland County. This motion died for the lack of a second. Said plan being as follows:

AT 10:00 A.M.

BE IT REMEMBERED THAT ON THIS THE 31ST DAY OF AUGUST A.D. 1963/THERE CAME ON TO BE HELD IN THE COURTHOUSE MIDLAND COUNTY, TEXAS A SPECIAL SESSION OF THE HONORABLE COMMISSIONERS' COURT, THOSE PRESENT BEING:

ALVEY BRYANT, JUDGE PRO TEM
CLARK MORELAND, Commissioner, Prec. 3
LOUIS OSBORNE, Commissioner, Prec. 4
ROSENELLE CHERRY, County Clerk

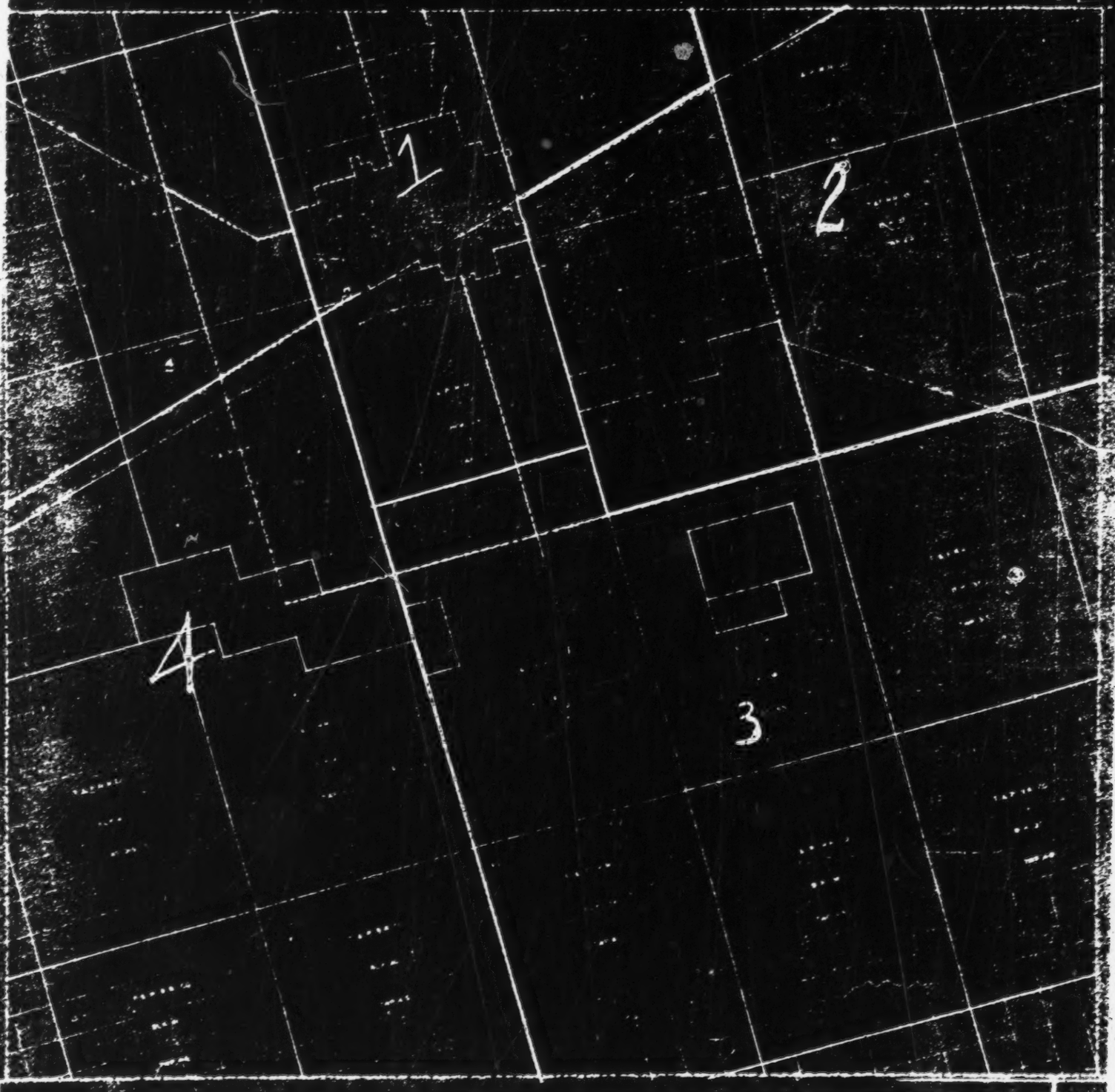
Due to the absence of Judge Culver and Commissioner Gideon, Motion was made by Commissioner Moreland, seconded by Commissioner Osborne, and all voting in favor to adjourn until 2:30 PM and hope Judge Culver and Commissioner Gideon would be able to attend the meeting.

Judge Pro Tem

The Commissioners' Court reconvened with the following members present:

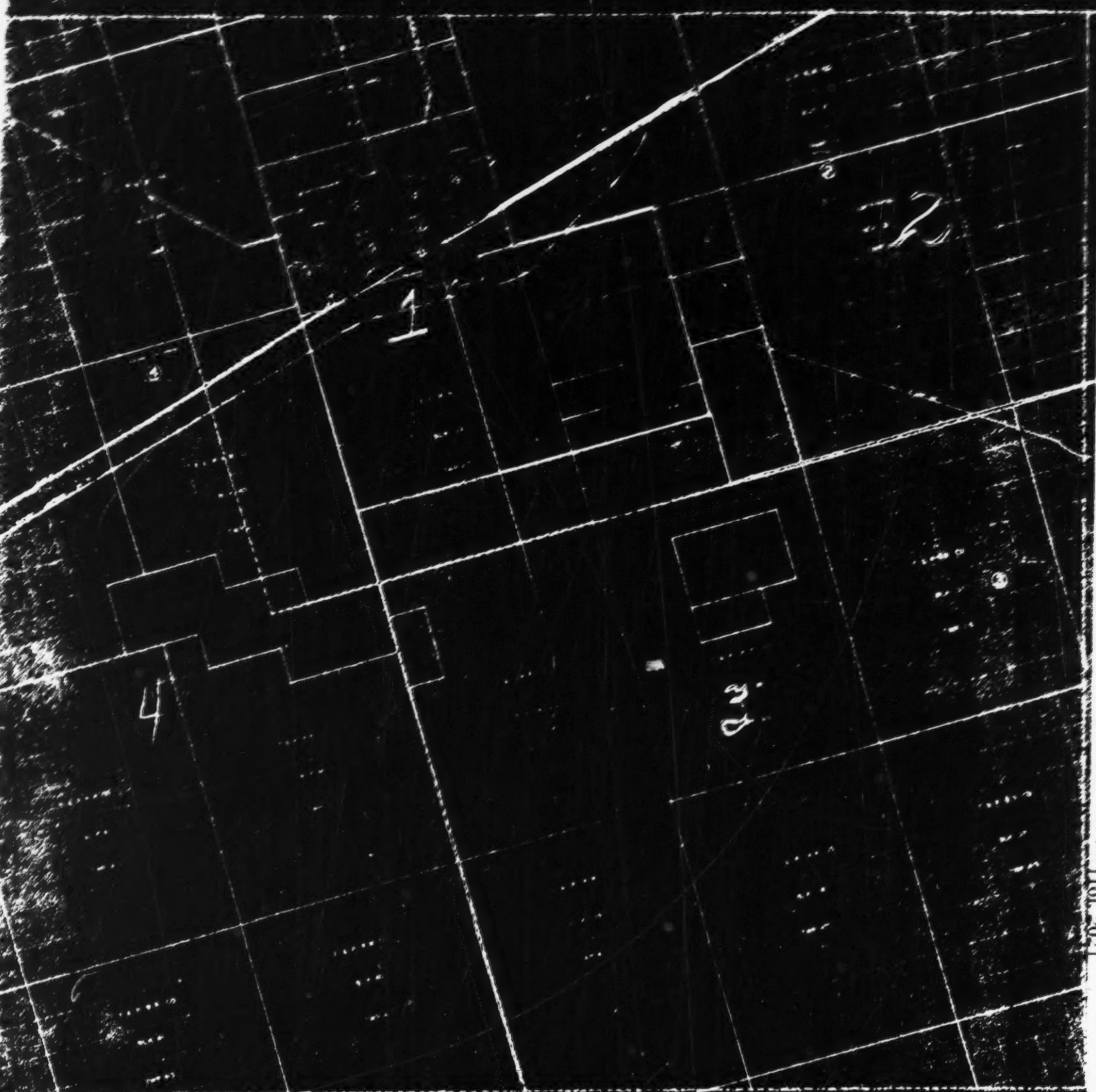
BARBARA G. CULVER, County Judge
EDWARD N. GIDEON, Commissioner, Prec. 1
ALVEY BRYANT, Commissioner, Prec. 2
CLARK MORELAND, Commissioner, Prec. 3
LOUIS OSBORNE, Commissioner, Prec. 4
ROSENELLE CHERRY, County Clerk

Commissioner Osborne submitted the following plan for re-districting Commissioners Precincts in Midland County.



[fol. 201]

Motion by Commissioner Bryant to adopt his plan for re-districting the Commissioners Precincts in Wise County as previously submitted at a special meeting held on August 6, 1964. Said motion died for the lack of a second, said plan being as follows:



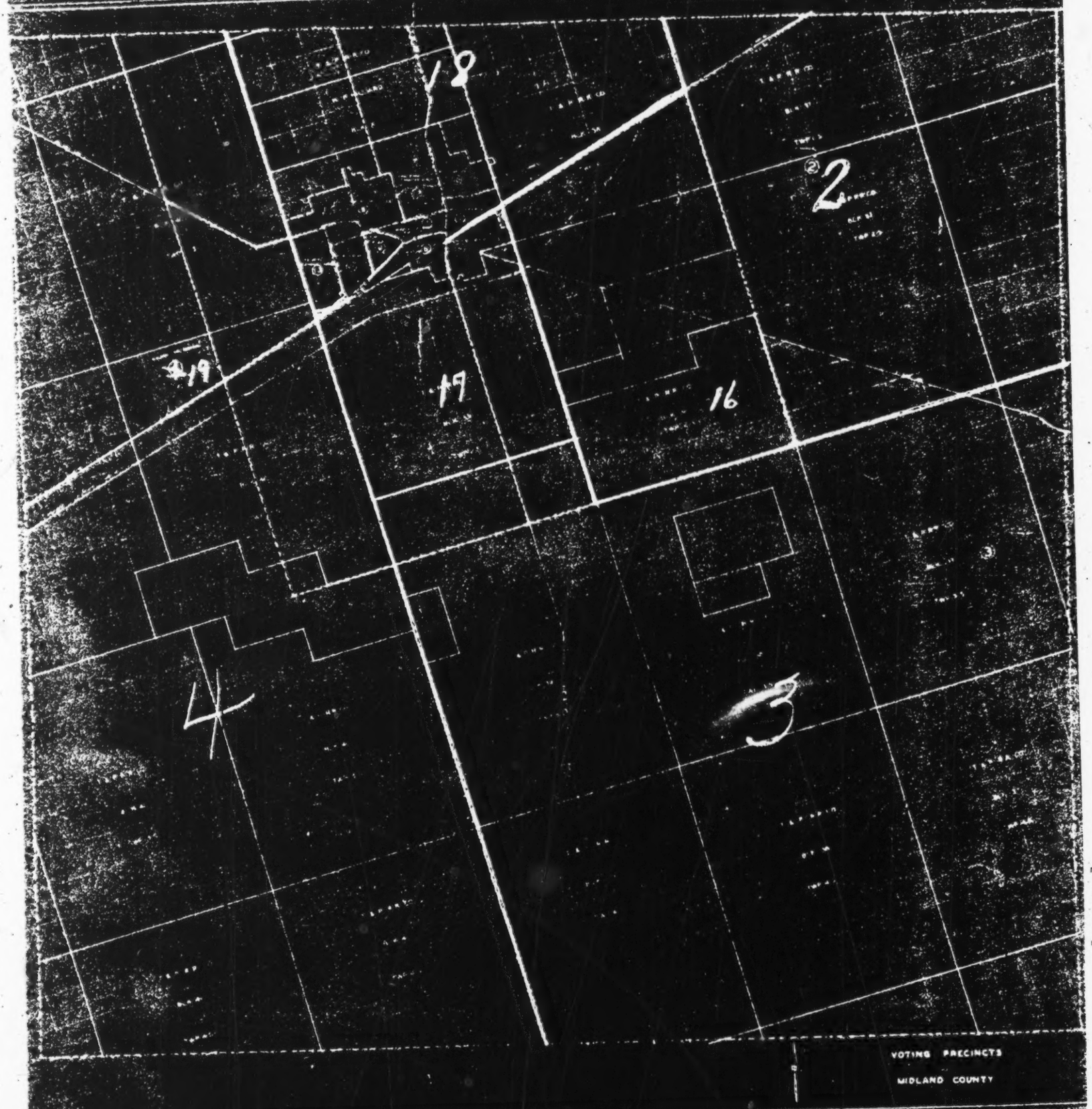
Commissioners Moreland and Osborne presented their plans to leave the Commissioners Precincts as they are presently established.

Judge Culver approved the plan of Commissioner Gideon and urged the Commissioners' Court to adopt it.

Motion by Commissioner Moreland, seconded by Commissioner Osborne to leave the County Commissioners' Precinct lines as they presently are until a further study could be made of them. Commissioner Bryant voted aye and Commissioner Gideon voted Nay.

All residents outside the City Limits of Terminal and in Commissioners Precinct No. 4 shall be in ... Precinct No. 4.

All boundaries of Commissioners Precincts and Voting Precincts shall become effective January 1, 1964.



There being no further business to come before the court the meeting was adjourned after the foregoing minutes were read and approved.

ATTEST: _____ County Clerk

_____ County Judge

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[fol. 204]

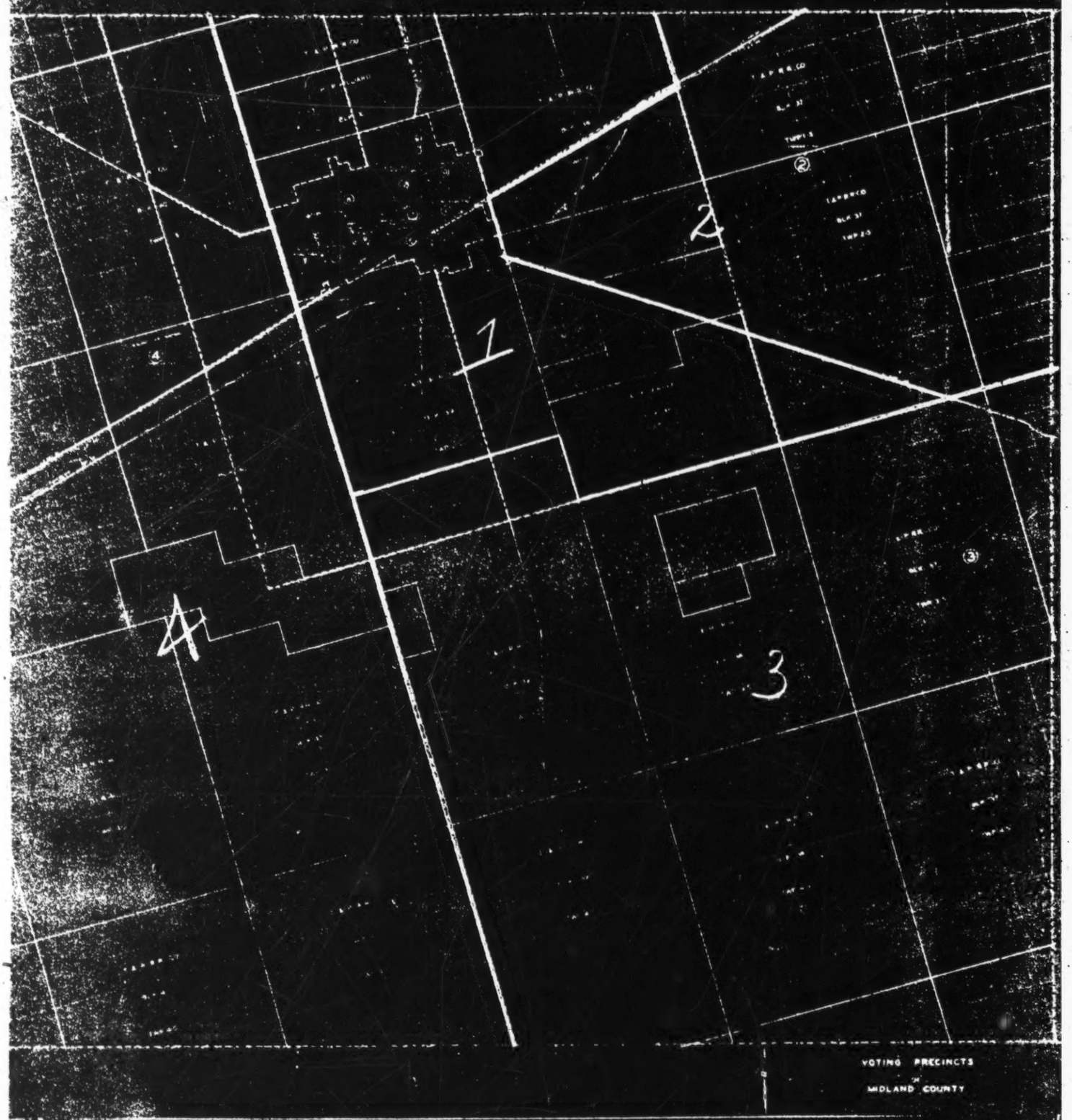
THE STATE OF TEXAS)
COUNTY OF MIDLAND)

I, ROSENELLE CHERRY, Clerk of the County Court in and for Midland County, Texas, do hereby certify that the above and foregoing is a full, true and correct copy of the minutes of a SPECIAL SESSION OF THE HONORABLE COMMISSIONERS' COURT as recorded in Volume 8, Page 246, of the COMMISSIONERS' COURT MINUTES of Midland County, Texas.

WITNESS my hand and seal of the County Clerk at Midland, Texas, this the 14th day of May, A.D., 1964.

ROSENELLE CHERRY, CLERK,
COUNTY COURT
MIDLAND COUNTY, TEXAS
BY /s/ IRENE MORRIS, Deputy

Commissioner Bryant submitted his plan for re-districting Commissioners Precincts in Midland County. Said plan being as follows:



After discussing both plans presented, Motion was made by Commissioner Osborne, seconded by Commissioner Moreland and all Commissioners voting in favor to adopt the plan presented by Commissioner Osborne on re-districting Commissioners precincts in Midland County. A map of this plan appears on page 246 of these minutes.

After changing the Commissioners Precinct boundary lines it was necessary to amend the voting precincts for 1964. Motion was made by Commissioner Gideon, seconded by Commissioner Bryant, and all voting in favor to amend these voting precincts as follows:

All residents South of the Garden City highway, in Commissioners Precinct No. 2 shall be in voting precinct No. 16.

All residents North of the Garden City Highway and in Commissioners Precinct No. 2 shall be in voting precinct No. 2.

All residents South of the railroad track, outside the City Limits and in Commissioners Precinct No. 1 shall be in Voting Precinct No. 17.

All residents North of the Railroad track, outside the City Limits and in Commissioners Precinct No. 1 shall be in Voting Precinct No. 18.

All residents within the City Limits of Terminal and in Commissioners Precinct No. 4 will be in Voting Precinct No. 19.

[fol. 207] There being no further business to come before the court the meeting was adjourned after the foregoing minutes were read and approved.

ATTEST /s/ ROSENELLE CHERRY, County Clerk
/s/ BARBARA G. CULVER, County Judge

THE STATE OF TEXAS)
COUNTY OF MIDLAND)

I, ROSENELLE CHERRY, Clerk of the County Court in and for Midland County, Texas, do hereby certify that the above and foregoing is a full, true and correct copy of the minutes of A SPECIAL SESSION OF THE HONORABLE COMMISSIONERS' COURT as recorded in Volume 8, Page 243, of the COMMISSIONERS' COURT MINUTES of Midland County, Texas.

WITNESS my hand and seal of the County Clerk at Midland, Texas, this the 14th day of May, A.D., 1964.

ROSENELLE CHERRY, CLERK,
COUNTY COURT
MIDLAND COUNTY, TEXAS
By: /s/ IRENE MORRIS, Deputy

[fol. 208] [File endorsement omitted]

[fol. 339]

IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS
142ND JUDICIAL DISTRICT
No. 18,018

HANK AVERY, Plaintiff,

vs.

EDWARD N. GIDEON, MIDLAND COUNTY COMMISSIONER OF PRECINCT No. 1, et al., Defendants.

THIRD AMENDED ORIGINAL ANSWER AND CROSS-ACTION OF MIDLAND COUNTY, TEXAS—Filed May 18, 1964

To the Honorable Judge of Said Court:

Now comes Midland County, Texas, appearing herein by and through its duly authorized, elected, qualified and

acting County Attorney, and files this its Third Amended Original Answer in the above styled and numbered cause, and would show the Court as follows:

I.

Midland County denies the allegations of paragraph 22 of Plaintiff's Sixth Amended Original Petition to the effect that Article V, Section 18, Constitution of Texas, means and must be construed as requiring that Midland County must be divided into Commissioners precincts having substantial numerical equality in population.

II.

Midland County denies the allegations of paragraphs 9, 20, 22, and 23 of Plaintiff's Sixth Amended Original Petition and any and all other paragraphs of said petition that directly or indirectly allege that Midland County, as it is presently created and organized, violates Amendment 14, Section 1 of the Constitution of the United States of America and Article 1, Sections 1, 2, 3 and 19 of the Constitution of the State of Texas; in this respect Midland County specially excepts to any and all of said paragraphs and asks that they be stricken from Plaintiff's pleadings for the reason that the Court, in this cause, has already ruled that the creation and organization of Midland County does not violate said constitutional provisions.

[fol. 340] III.

Midland County cannot either admit or deny the Plaintiff's allegations of abuse of discretion of any of the other defendants, but demands strict proof thereof, and, as to all other matters herein, Midland County denies each and every, all and singular, the other allegations contained in Plaintiff's Sixth Amended Original Petition, and of this, puts itself upon the country.

Wherefore, Midland County prays that Plaintiff take nothing as to it and that no costs be adjudged against it.

Cross-Action

Now comes Midland County, Texas, hereinafter sometimes called "Cross-Plaintiff", complaining of Hank Avery, hereinafter sometimes called "Cross-Defendant", and by way of Cross-Action would show the Court the following:

I.

Midland County is a legal subdivision of the State of Texas, and a body corporate, duly organized and existing under and pursuant to the Constitution and laws of the State of Texas, and appears herein by and through its duly authorized, elected, qualified and acting County Attorney, and by virtue of an order and resolution duly passed by its Commissioners Court.

II.

The only interest of Midland County in this controversy is to have judicially declared, determined and established as follows:

(1) That it is duly and lawfully created and organized pursuant to valid and subsisting provisions of the Constitution and laws of the State of Texas,

(2) That the officers and officials who serve in their various capacities in Midland County are authorized to serve as such by virtue of the political framework of a duly and lawfully created and organized County of the State of Texas, and

(3) That all acts performed by said officers and officials within the scope of their respective authorities are official [fol. 341] acts of their respective lawful offices.

Due to changes made in the Election Code for 1964 the election voting precincts estab[illegible] meeting held on August 12, 1963 will have to be amended to comply with the 1964 Election Code.

Motion by Commissioner Bryant, seconded by Commissioner Gideon, and all voting in favor that Vo[illegible]s 1, 2, 3, 8, 10, 11, 13, 14, and 15 shall end at the City Limits and the following new voting precincts [illegible] organized:

All residents South of the Railroad track, East of South Big Spring (Rankin Hwy.), outside the City Limits, and in Commissioners Precinct 1 will be in Voting Precinct No. 16.

All residents South of the Railroad track, West of South Big Spring (Rankin Hwy.), outside the City Limits, and in Commissioners Precinct No. 1 will be in Voting Precinct No. 17.

All residents North of the Railroad track, outside the City Limits and in Commissioners Precinct No. 1 will be in Voting Precinct No. 18.

All residents within the City Limits of Terminal and in Commissioners Precinct No. 4 will be in Voting Precinct No. 19.

[Vol. 206]

III.

A dispute and controversy has arisen between Midland County and Hank Avery in that the latter asserts, contends and alleges that the Constitution of the State of Texas requires that Midland County be divided into four Commissioners precincts having numerical equality in population, and that such division has not been made; a further dispute and controversy exists in that Hank Avery also claims, contends and alleges that the section of the Texas Constitution and the statutes and orders under which Midland County was created and organized are void and in conflict with certain provisions of the United States Constitution.

IV.

The existence of this dispute and controversy materially affects the rights and interests of Midland County, Texas by casting doubt and uncertainty on the validity of its origin and creation and, consequently, on the legal authority of its officials to act, thereby amounting to a controversy which is sufficient to invoke the jurisdiction of this Court under the Texas Declaratory Judgment Act.

V.

Midland County says that in truth and in fact the Constitution of the State of Texas does not require that Midland County be divided into four precincts of substantial numerical equality in population, and the omission of that requirement in the Act of the Legislature creating Midland County and the failure to comply with that requirement in the original and subsequent orders establishing precinct boundaries do not render invalid, illegal or void the creation and/or organization of Midland County, Texas. Further, Cross-Plaintiff says that the provisions of the Texas Constitution under which Midland County was created and organized are not violative of, or in conflict with, any provision of the Constitution of the United

States, and the Act of the Texas Legislature creating and [fol. 342] organizing Midland County and the several orders fixing and establishing Commissioners precincts are valid, subsisting, legal enactments and orders.

Wherefore, Midland County prays that on hearing hereof, it have and recover of and from Hank Avery and all persons belonging to the class of persons whom he represents, or acting in concert with him, a declaratory judgment decreeing, declaring and establishing the following:

(1) That the Constitution of the State of Texas does not require that Midland County be divided into four precincts of substantial numerical equality in population,

(2) That Midland County is a valid, legal, existing subdivision of the State of Texas, and

(3) That all provisions of the Texas Constitution, laws and orders under which Midland County has been created and organized are valid, subsisting and constitutional under the provisions of the Constitution of the United States of America,

Midland County further prays that it have costs of suit and for such other relief, general or special, in law or in equity, to which it may show itself justly entitled.

Harrell Moore, County Attorney, Midland County, Texas, Attorney for Defendant Midland County, Texas.

[fol. 343] *Duly sworn to by Harrell Moore, jurat omitted in printing.*

[fol. 344] [File endorsement omitted]

[fol. 252]

IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS

March Term, A.D. 1964

No. 18018

HANK AVERY, Plaintiff,

vs.

EDWARD N. GIDEON et al., Defendants.

STATEMENT OF FACTS—May 18, 19, 1964

CLARK MORELAND, called by plaintiff, after first being duly sworn, testified as follows:

Direct examination.

By Mr. Olson:

Q. Your name is Clark Moreland. Is that correct?
A. Yes, sir.
Q. And, Mr. Moreland, where do you reside?
A. I reside at Route 1, Box 66, which is 10 miles south of Midland.
Q. In Midland County?
A. Yes, sir.
Q. And how long have you resided in Midland County?
A. Little over 20 years.
Q. And how old a man are you, Mr. Moreland?
A. Thirty-five.
Q. Now, Mr. Moreland, what is your educational background, please, sir?
A. High school.
Q. Did you graduate from high school here in the city of Midland?
A. Yes, sir.

Q. And what year did you graduate?

A. 1947.

[fol. 253] Q. Now you state that you live at Route 1, Box 66, Midland, which is about 10 miles south of the city of Midland.

A. Yes, sir.

Q. Now if you live about 10 miles south of the city of Midland, what commissioners precinct do you live in?

A. No. 3.

Q. Now, I believe that you are a member of the commissioners court of Midland County.

A. Yes, sir, I am.

Q. And you are the member of the commissioners court that represents Precinct No. 3.

A. Yes, sir.

Q. How long have you been on the court?

A. Since January 2, 1961.

Q. Did you run this year?

A. Yes, sir.

Q. Did you have an opponent?

A. No, sir.

Q. How many votes did you get?

A. Me?

Q. Yes.

A. About 92, I believe.

Q. Ninety-two votes.

A. Yes, sir.

[fol. 254] Q. Were those the total votes that were cast in Precinct 3?

A. No, it was around 98, I believe.

Q. Ninety-eight votes that were cast in Precinct No. 3. Now in addition to your serving, representing Precinct No. 3, you also have an elected commissioner representing Precincts 1, 2, and 4. Now who represents Precinct No. 1?

A. Mr. Ed Gideon.

Q. And is he in the courtroom?

A. Yes, sir.

Q. And who represents Precinct No. 2?

A. Mr. Alvey Bryant.

Q. Is he in the courtroom?

A. I don't believe he is here at this time.

Q. And who represents Precinct No. 4?

A. Mr. Louis Osborne.

Q. And those are all of the elected commissioners from Midland County?

A. Yes, sir.

Q. In addition to that are there any other members of the commissioners court in addition to you four?

A. The county judge.

Q. And the five of you make up the commissioners court of Midland County.

[fol. 255] A. That is right, sir.

Q. Now, Mr. Moreland, you have been in the courtroom during the course of this week that we have been trying this case.

A. Yes, sir.

Q. And you have heard the many exhibits presented and the testimony given from the witness chair. That is correct, isn't it?

A. That is right.

Q. Have you heard the objections made by counsel and the efforts that have been made to establish the population density of Midland County? That is correct, isn't it?

A. Yes, sir.

Q. Now, Mr. Moreland, you say that you have lived in this county for 20 years.

A. Yes, sir.

Q. Now has most of that 20 years been in Precinct 3 or have you lived in the city of Midland part of the time?

A. Been in Precinct 3 all the time.

Q. During the whole 20 years?

A. Yes, sir.

Q. You have lived there. Now, Mr. Moreland, I am sure as a member of this commissioners court and, of course, you

recognize the fact that as a member of the commissioners court you represent all of the people living in the county. [fol. 256] That is right, isn't it?

A. Yes, sir.

Q. Your responsibilities are not exclusively those of Precinct 3.

A. No, sir.

Q. Now, during the course of your years here in the county and your time of service on the commissioners court, you have, of course, had occasions to traverse from north to south and east and west of this county.

A. Yes, sir, I believe I have covered every road in this county.

Q. Yes, sir, I am sure you have, and, of course, you are not—you wouldn't tell the Court here today, or you would tell the Court here today that there is no question but what by far the large majority of the people of Midland County live in Precinct No. 1. Now that is true, isn't it?

A. Well, it is always a known fact in all west Texas counties it is mostly one larger town and that's the—

Q. And isn't that—

Mr. Browder: Now wait just a minute. Your Honor, counsel has been interrupting the witness half the time. The witness wasn't through when counsel started asking him another question. I am going to ask that the witness be permitted to take his time, wait until counsel gets [fol. 257] through with his question, and that the witness be permitted to answer the question completely and fully before counsel starts again.

Q. Mr. Moreland,—

Mr. Browder: Now wait just a minute! Let the Court rule.

The Court: All right, that will be permissible. Of course, if his answer is not responsive, well, then I think then—

Mr. Browder: Counsel will interrupt to you and not the witness.

The Court: All right.

Mr. Browder: Now just let the witness answer.

The Court: All right.

Mr. Browder: And the witness hasn't answered when counsel interrupted, and I'll let the Reporter read back if counsel—

The Court: I think I can run the Court, Mr. Browder. You will have your seat.

Mr. Olson: Thank you, your Honor.

Mr. Browder: I do address myself to the Court.

The Court: I understand.

Q. Mr. Moreland,—

Mr. Browder: I don't think he had completed his answer [fol. 258] when counsel interrupted him.

The Court: Well, let's let him have his seat and let him frame his question again, counsel.

Q. Mr. Moreland, first of all I would like to apologize to you if I did not give you an opportunity to answer the questions I asked you. Now, by and large there is no question but what the large majority of the citizens of Midland County live in Precinct No. 1. Now that is true, isn't it?

A. Of course, like I started to tell you, in all west Texas counties there is mostly one larger town, and that is where, naturally, the most of your population is. Anybody can see that most of the population is in the town, but we are not running the city government.

Q. Well, I appreciate the fact that you are not running the city government.

A. Yes, sir.

Q. Now, Mr. Moreland, Precinct No. 3 is very sparsely populated. That is true, isn't it?

A. Well, sir, it has got some areas in it that is pretty well populated, and there is areas in it that is ranch land and it don't have a very large majority of people in it, sure.

Q. Now under this 1963 Order, you heard Mr. Max Schumann testify yesterday that in Precinct No. 3 that he had

gone out there and checked the width and found that there [fol. 259] were, occupied and unoccupied, 146 dwellings in Precinct No. 3. Now you have no quarrel with those figures, do you, Mr. Moreland?

Mr. Pannill: Now, your Honor, we are going to object to him asking this witness to evaluate or pass on the credibility or accuracy of another witness. If he wants to ask him how many are there, if he knows, then the Court can judge for himself whether his testimony is the same as or different from the other witness.

Q. You say that is substantially correct?

Mr. Browder: Now wait a minute! Let the Court rule.

The Court: I didn't understand your objection as being an objection, counsel.

Mr. Pannill: Well, we object to his question on the ground that it calls for a conclusion of the witness as to the accuracy or credibility of another witness, which is a matter for the Court to determine and not for this witness to testify about.

Q. Well, you know about how many—

Mr. Browder: Let the Court rule.

The Court: I am going to sustain the objection, as far as it goes. You can ask the witness if he knows and then if he knows what the figure is.

Q. Very well. Do you know about how many dwellings [fol. 260] are located out there in your precinct, Mr. Moreland?

A. I don't know the exact number.

Q. Would you say about 150, just roughly?

A. I wouldn't know exactly, sir.

Q. Well, would that be a pretty good estimation?

A. It could be more.

Q. It could be more—

A. Yes.

Q. —and it could be less, but you would say, generally, in the area of 150.

A. I think there would be a few more.

Q. And then, Mr. Moreland, a man living in the area that has about 150 dwellings throughout the area and having lived there 20 years, I imagine you know most all the people living in Precinct 3. That is true, isn't it?

A. I do now. Before I ran for office I did not. I didn't know 20% of them before I ran for office.

Q. Well, would you say there is about, and again I am not trying to pin you down specifically, but taking into consideration the fact that you say there is about 150 dwellings in that area, more or less, and taking into consideration the further fact at the recent election there were about 90 votes cast, would you say that there are about 400 people that live in Precinct 3?

[fol. 261] A. Well, I wouldn't know, because I don't know whether all paid their poll tax or not.

Q. Well, I know. I am not talking about those that paid poll taxes. I say, would you say that there is about, without having to repeat, 400?

A. I think there would be more than that, yes, sir.

Q. Well, would you say it would be more than 500?

A. It could be.

Q. Would it be more than 600?

A. Well, I don't know, sir.

Q. Well, what would be your best judgment?

A. I just don't know.

Mr. Browder: Now, your Honor, the witness has said he didn't know and answered the question. Further pressing is argumentative, and we object to it on that ground.

The Court: I sustain the objection.

Q. Do you have a judgment?

A. It is not a great number, no, sir.

Q. And would you say it is less than 1,000?

A. I would think so.

Mr. Pannill: Your Honor, he has answered that he doesn't know.

Mr. Olson: He said it is less than a thousand. I don't know; I haven't been out there.

[fol. 262] The Court: Proceed.

Q. Mr. Moreland, you stated that you were a member of the commissioners court and, as such, took care of the business of Midland County. Now do you and your fellow members of the court meet regularly to take care of the various business activities of the county?

A. Yes, sir.

Mr. Pannill: Your Honor, we object to that question as being duplicitous as stating a fact which is not in evidence and is calling for a conclusion of this witness, insofar as he was asked if they took care of the business of Midland County. He is a commissioner, and he performs the duties of a county commissioner. Whether that does or does not constitute the business of Midland County is a legal conclusion, and we object to the question and the answer which it seeks to elicit on that ground.

The Court: Overrule the objection.

Q. Answer the question, please.

A. Will you please state it again?

Q. Do you, as a member of the commissioners court, sitting with the other members, elected members, of the commissioners court from Precincts 1, 2, and 4, and the county judge, take care of the business matters of Midland County?

A. Yes, sir.

[fol. 263] Q. Now do you meet regularly or do you meet on call of the member voters?

A. We meet regularly twice a month and have a special meeting at any time any member of the court or the county judge sees fit.

Q. And when do you meet regularly?

A. The second and fourth Mondays.
Q. Of each month, and you meet here in the courthouse?
A. Commissioners court room, yes, sir.
Q. In the city of Midland.

Mr. Browder: Now, your Honor, that again, and I address myself to your Honor, but counsel absolutely interrupted the witness before he was half through. I am going to ask the Court to instruct counsel to refrain from starting his questions until the witness is completely through with his answers.

The Court: Try to watch yourself.

Mr. Browder: Now may the witness be permitted to answer the question, and may the question be read by the Reporter so we will know that it is the same question?

The Court: All right, let the Reporter read the question and, if there is any doubt, he can rephrase the question.

(The last three questions asked the witness as above [fol. 264] set out were read to the Court and counsel.)

Mr. Olson: My question was whether they meet here in the city of Midland.

The Court: Is that the question?

(The Reporter repeated the last question by counsel, as follows:)

"Q. In the city of Midland."

A. I think that all county commissioners and county judges meet in the courthouses of every county in Texas, sir.
Q. Well,—
A. We do, too.
Q. —I am not concerned about the other counties in Texas, Mr. Moreland.
A: Well, that's the law. That is where we meet.
Q. Now, just answer my question, if you would, please.
A. Well, I just did, sir.

Q. You meet here in the courthouse.
A. Yes, sir.
Q. In the city of Midland.
A. Yes, sir.
Q. Twice a month.
A. Yes, sir.
Q. Regularly.
[fol. 265] A. Yes, sir.
Q. Now, Mr. Moreland, when you meet here in the courthouse in Midland County as a member of the commissioners court, do you take care of various business activities of Midland County?
A. Yes, sir.
Q. Would that include such matters as buying equipment for all of Midland County?
A. We do, sir.
Q. That would include buying all types of county equipment used in Precincts 1, 2, 3, and 4. Is that right?
A. Yes, sir.
Q. Mr. Moreland, I will ask you whether or not, also, in some of these business stations that you have if you adopt the budget for the city of Midland.
A. Yes, sir, once a year.
Q. For Midland County.
A. Yes, sir, once a year, not for the city of Midland but Midland County.
Q. And does this budget take care of all the expenditures of the tax funds.
A. Yes, sir.
Q. Of Midland County.
A. Yes, sir.
[fol. 266] Q. This budget sets forth the salaries that are paid to the employees of Midland County. Is that right?
A. Yes, sir, we set all salaries.
Q. Does this budget also set the salaries of the commissioners or is that set by statute, or do you know?

A. We do set them. You have a statute that you can go by up to a certain fee, according to the population and various things, but we do set the salaries of everyone in the courthouse including our own.

Q. You set your own salaries?

A. Yes, sir, of all elective officials plus ours.

Q. And you appropriate the money for these salaries through the establishment of a tax rate. Is that correct?

A. Yes, sir, we sure do.

Q. And the tax rate for Midland County is established by the commissioners court composed of commissioners from 1, 2, 3, and 4, and the county judge. Is that right?

A. Yes, sir, that is right.

Q. Now under your procedure, does the county judge vote except in a tie?

A. No, sir, she does not.

Q. So, actually, these decisions, if there is not a tie, these decisions about the setting of salaries, the adoption of a budget, the adoption of tax rates, made to affect all of [fol. 267] Midland County, are made by the commissioners from Precincts 1, 2, 3, and 4. Is that right?

A. That is right, sir.

Q. Now, Mr. Moreland, in addition to the establishment of the tax rates and adoption of budgets and the purchase of equipment, and so forth, I will ask you whether or not the commissioners court also sits as a Board of Tax Equalization.

A. We set as a Board of Equalization, yes, sir. That's the law.

Q. All right. Now, as a Board of Equalization, the duties and responsibilities of the commissioners court are what? What do you do in a Board of Equalization?

A. We listen to each taxpayer that comes in. They are sent a notice that their taxes are raised. We listen to each one that comes in and we check it to see if it is unfair with the values around it, or anything of that nature, and if they are unfair we are supposed to change them.

Q. If you think a taxpayer's tax value or the value that is rendered by the taxpayer is too low, you will raise it, or if too high you will lower it. That is true, isn't it?

A. Well, sir, that is our job, you know, to see if they come up. The tax assessor sends them a notice if it has been raised, and the tax assessor is the one that does send out all notices. He is the one that sets the tax on their land, [fol. 268] the houses, or any improvements that they have. Any business, any personal property, or anything, the tax assessor does set it on there, and then they come to us if they think it is not right.

Q. Don't you, as a member of the Board of Equalization, meet in private sessions and go over the tax rendition sheets as prepared by the tax assessor and collector prior to the time these notices are sent out?

A. No, sir, we do not.

Q. You do not.

A. No, sir.

Q. Now, Mr. Moreland, before I get on another matter here I want to go back a little bit. How close do you live to your nearest neighbor?

A. Sir.

Q. How close do you live to your nearest neighbor?

A. About one block.

Q. A block?

A. Yes, sir.

Q. Is there a cluster where you live or is there from there a good—

A. Another block.

Q. Another block?

A. Yes, sir.

[fol. 269] Q. Are those kinfolks or just people—

A. Well, one of them is and one of them is not.

Q. Now, Mr. Moreland, do you have a constable in Precinct No. 3?

A. No, sir, we do not.

Q. Have you ever had one?

A. Not to my knowledge.

Q. Was one elected this year?

A. No, sir, there was not. No one run.

Q. And you have never appropriated any money for the payment of a constable.

A. No, sir, we have not.

Mr. Browder: I am going to object to this question about money paid to a constable or a constable being elected for a precinct as being immaterial and irrelevant.

The Court: I will sustain the objection.

Q. Do you have a justice of the peace in Precinct No. 3?

A. No, sir, we do not.

Q. Now, Mr. Moreland, in addition to the various things you have related, I will ask you whether or not it is the duty and responsibility of you members of the commissioners court to distribute the monies in the Road and Bridge Fund.

A. The spending of the money of the Road and Bridge Fund, yes, sir, we do. That is the main job of the county [fol. 270] commissioners.

Q. And it is your responsibility, the commissioners of Precincts 1, 2, 3, and 4, to decide how much will be spent in each specific precinct.

A. No, sir, we have a unit system. We do not have our Road and Bridge money divided in Midland County, and we all draw from the same fund.

Q. All right, you said you have a unit system. Just tell me what a unit system is, Mr. Moreland.

A. Well, a unit system, we have all our equipment together, and that way we are cutting down on our expenses. We have one road overseer.

Q. Have what?

A. One road overseer.

Q. Do you spend the same amount in each commissioners precinct? Is that what this unit system is?

A. Well, sir, we have it set up. The way we have it now, each one of us is putting in approximately three miles of paved road in each precinct.

Q. In other words, each year Precinct No. 1 gets three miles of paved road, Precinct No. 2 gets three miles of paved road, Precinct No. 3 gets three miles of paved road, and Precinct No. 4 gets three miles of paved road.

A. We had it worked out like that, but if there is another [fol. 271] precinct that needs something—Precinct 1 has always drawed some more pavement at times and, if they need it, we work together.

Q. If No. 3 needs it, then additional work is done in No. 3.

A. We try not, you know, to take it from each other, but if we do see a job in my precinct I wouldn't mind asking for it, no.

Q. Asking No. 1 to give you some of his money to put in 3.

A. Not the money, sir. We got our money altogether and we do not have it set apart.

Q. Well, this money is divided by the commissioners court. That is the point I am trying to get at.

A. No, sir, we do not divide it.

Q. Well, who divides it?

A. We just have it in the Road and Bridge Fund, and we put so much money in our budget. We work these different precincts with it and pay the bills out of this one fund.

Q. But the commissioners court decides, basically, how much will be done in each one of the commissioners precincts.

A. Not basically. We have just kind of a rule that we do put three miles in each precinct, and some years I have seen more precincts that didn't pave any and some years paved more than three miles. It is just according to what [fol. 272] you get paved in. I have a problem of water in my precinct and—

Q. Drinking water?

Mr. Pannill: Now, your Honor,—
The Court: Don't interrupt him.

A. I have a problem of water, and sometimes I have to wait in the wintertime or sometimes we have to truck the water a long ways to get the paved road, and we work it around to different times and work at different seasons of the year where each one of us can have the equipment. We take this equipment around to each precinct at certain times of the year when, you know, we get ready to do some extra work.

Q. All right. Now, Mr. Moreland, does it also fall within your duties and responsibilities that you perform as a member of the commissioners court, you and the other three members, to expend the bond funds of the county?

A. Yes, sir.

Q. Does it also come under your responsibility and do you and the other three members of the commissioners court call all of the county elections, canvass the returns, and declare the results of these elections?

A. On general elections and the bond elections, yes, sir.

Q. Well, is it also true on commissioners elections?

A. No, sir, we don't canvass primaries.

[fol. 273] Q. Who does that?

A. The Democratic Party and the Republican Party.

Q. All right. Now, Mr. Moreland, you have testified here earlier that by and large the much larger population of Midland County is located in Precinct No. 1.

Mr. Pannill: Your Honor,—

Q. In view—

Mr. Pannill: Excuse me, counsel.
The Court: Go ahead and finish your question.

Q. Now were you a member and sitting on the Board of Equalization when this matter of redistricting the—I mean the commissioners court—when this matter of redistricting the commissioners precincts came before you?

A. When Mr. Avery came up and—in September 1963?

Q. Yes.

A. Yes, sir, I sure was.

Q. This has been an issue ever since you have been on the court. That's true, isn't it?

A. Oh, there have been lots of people who have wanted to take over control for several years.

Q. I didn't hear what you said.

A. There has been a bunch that has wanted to take over control for several years, yes, sir.

Q. A bunch wanted to take over control of what, Mr. [fol. 274] Moreland?

A. To get everything up here in one little cluster.

Q. In other words, you mean the people.

A. No, sir, not the people; a little group.

Q. Now, Mr. Moreland, first of all before we get into detail on that. I believe, is your house where you live taxed for tax purposes?

A. Sir?

Q. Is your house on the tax rolls?

A. I believe they put it on this year.

Q. Has it been on prior to this year?

Mr. Browder: Now, your Honor, we object to the question as to whether his house has been on the tax rolls as being immaterial and irrelevant on the question of division of the county into commissioners precincts.

Mr. Olson: If it please the Court, we have pled in this case that the commissioners court has abused its discretion in the way this county is divided up for the reason that the members in these areas where the population is small and sparse have controlled the commissioners court and have determined and established a Board of Equalization. We have claimed that this action on their part is arbitrary, capricious and unfair to the vast majority of the citizens of Midland County. I intend to prove by this witness that [fol. 275] prior to this year, even though the improvements, the houses of the citizens of the city of Midland,

were placed on the tax rolls, that the improvements and the houses in Precincts Nos. 2, 3, and 4 and outside of the city of Midland, were not placed on the tax rolls. We think it is extremely material in that respect.

Mr. Pannill: Your Honor, the counsel's petition contains that allegation. The Court has heretofore sustained an exception to a similar or comparable allegation. The Court has, as I understand it, under advisement at this time another exception to the renewed allegation. Now, your Honor, the issue which has been made here is whether the commissioners court abused its discretion when it prepared a redistricting Order on August 31, 1963, to attempt to drag into this controversy questions as to claimed or imagined inequities as to tax valuations, those completely beyond the scope of pleadings in this case. The tax valuations of property in this county, both urban and rural, have been passed on and found to be correct by successive Boards of Equalization of the county, of the city, and of the school district. For this plaintiff to come into this Court at this time and attempt to show something is wrong with tax valuations, which have been duly and legally passed upon, constitutes a mere collateral attack on a quasi-judicial find of the Boards of Equalization. This plaintiff has no proof or [fol. 276] allegation that he has appeared before any of the Boards of Equalization, that he has so tested any tax values, that he has suffered any financial harm as a result of that. He has not joined as a party to this suit, the public official whose primary duty it is to fix the tax valuations. Consequently, we have it here by this line of questioning and we can anticipate it for further questions, to attack collaterally in this proceeding the findings of Boards of Equalization of the county, of the city, and of the school board. We object to it on the ground that it is irrelevant and immaterial to any issue in this cause.

Mr. Browder: Your Honor, we wish to add to that—

The Court: Without any further argument on this particular thing, since the Court has been carrying it along

until we reached this point, I would like to talk to counsel in chambers here. I think we might get it going a little more smoothly. While on the record, I would like to have a little discussion with counsel in chambers.

(Following the discussion of Court and counsel in chambers, all parties returned to their respective seats in the courtroom and the trial proceeded as follows:)

Mr. Olson: The Court has sustained the objections that [fol. 277] were made?

The Court: The special exception, in other words now, as far as—

Mr. Olson: Well, I understand they made an objection to his testimony, but the Court is now ruling on the special exception which he took under advisement.

The Court: That's right, that is correct.

Mr. Olson: You are making no ruling on the objection.

The Court: Well, I don't recall the objection. I thought we were just—I thought the objection was asking the Court to go ahead and rule on the special exception.

Mr. Pannill: It was a two-prog—

Mr. Olson: (Interrupting.) I will ask him a question, then.

Q. Mr. Moreland, prior to this year I understood you to testify at the time counsel made the objection that the improvements located on real property located outside the corporate limits of the city of Midland were not placed on the tax rolls. Is that correct?

A. Yes, sir.

Mr. Olson: That is the question.

Mr. Pannill: Your Honor, to that question we object on the ground that it seeks to elicit information from this [fol. 278] witness which constitutes a collateral attack on the valuations placed on real property and personal property by the tax assessor and passed on by the Board of Equalization, in that it goes beyond the scope of proceed-

ings in this case and in that it is irrelevant and immaterial to any issue in this case and could not form a basis of decision one way or the other as to whether or not there was an abuse of discretion in the August 1963 Order. For all of those reasons we object to the question.

The Court: I sustain the objection.

Mr. Olson: May it please the Court, I would like for the record to show at this time that this evidence is introduced, is offered, for the limited purpose of showing abuse of discretion on the part of the commissioners court, who, as the testimony shows in this case, set and have set as a Board of Tax Equalization for Midland County.

Mr. Pannill: We renew the objection, your Honor.

The Court: I sustain the objection.

Mr. Olson: May we make it further—further, for the limited purpose of showing abuse of discretion on the division of this county of commissioners precincts by the Order adopted on August 31, 1963.

Mr. Pannill: We renew the objection.

The Court: I sustain the objection.

[fol. 279] Mr. Olson: We would like at this time to make our Bill, your Honor.

The Court: All right, you may start on it.

Mr. Pannill: As heretofore, we will ask that counsel notify us when he has completed his Bill so that we won't raise any objection, and until he notifies us we will assume that all of this is on the Bill.

Q. Mr. Moreland, you understand at this time we are making a Bill for the purpose of the record. Would you answer my question as to whether or not prior to this year the improvements located on real estate located outside the corporate limits of the city of Midland were placed on the tax rolls or were not placed on the tax rolls.

A. O. K., can I explain it to you?

Q. Yes, sir.

A. All right. In 1956, I believe, Pritchard & Abbott, an evaluation firm, made a survey of Midland County and

they put everything on. All right, as far as the improvements showing on there, they do not, but as far as being on there, you know yourself, that land and everything we have put on, including improvements, were included with it. There has been some fuss and some sore, and everything, since all this started about putting improvements on separate. The way I see that, if you tax the land and then come [fol. 280] along and put improvements on it separate, well, all you can do then, as far as putting improvements on there, is just what they will bring and they put it on and take it off.

Q. So your answer to my question is "no, they were not." Is that correct?

A. Sir, they were put on there. Everything was included. They just list a separate parcel of land, such as a section number and a block number, and they put it on there as a total figure.

Q. And did not show real estate, so much improvements so much, but only—

A. (Interrupting.) It just showed so much tax on the land.

Q. Now the improvements were placed on the tax rolls inside the corporate limits of the city of Midland, were they not?

A. I believe they are taxed just the same, the lot plus the house.

Q. Plus the house, but—

A. (Interrupting.) I imagine it is. They'll just put it on there as so much a front footage and everything.

Q. In other words, inside the corporate limits of the city of Midland, the tax rolls showed a lot plus the house but outside it just showed the land and no mention was [fol. 281] made of the improvements?

A. That is correct, just a piece of property is what it showed. What we go by is a piece of property, and they will tell us what is on there or what kind of property it is. All we got is the card to go by or knowing it by its description or by sight.

Q. But this year the land has remained the same but you have started putting the improvements on the—

A. (Interrupting.) I haven't done nothing. I am not tax assessor.

Q. Well, you are on the Board of Equalization, aren't you?

A. I haven't made the Board of Equalization yet, though.

Q. Well, what I asked you and I understood you to say earlier was that this year it was on. Now what—

A. (Interrupting.) I talked to the tax assessor and he said that they had changed it, so far as my end is concerned.

Q. Mr. Moreland, I understand the tax assessor made up these various tax rolls and tax sheets that were furnished to you, but you, sitting as a Board of Equalization, did you consider the land in the area exclusively as land or as land with improvements located on it?

A. Sir, the ones that came to us on the Board of Equali- [fol. 282] zation complained about their property. We looked into it and then we looked at the other and then we thought if they were satisfied we were satisfied.

Q. Without taxing the improvements.

A. Sir?

Q. Without taxing the improvements.

A. The tax assessor didn't have them on there.

Q. Yes, but I say you were satisfied with—

A. (Interrupting.) Yes, we just set that—we just got one day, sir, to set as a Board of Equalization. The tax assessor plus all his help has got the whole year, and we got one day.

Q. Well, you could sit longer than one day if you wanted to, couldn't you?

A. Yes, but we can't set a whole year. We got other things to do.

Q. It is your testimony that the Board of Equalization, ever since you have been sitting on it, equalizes all the

values of all the taxes on all the property in Midland County in one day.

A. No, sir, we have run into more days than one.

Q. How many?

A. Sir.

Q. How many?

[fol. 283] A. Oh, it has run into two or three days. The school board and city council meet at the same time we do and they generally beat us through, and they have the same tax on this property out there at the school board as we have ourselves, the county has. If we are so far wrong, they are wrong, too.

Mr. Olson: Well, of course, we object to that on the ground it is not responsive.

The Court: I sustain the objection for you.

A. (Continuing.) Well, it's true.

Mr. Olson: And ask it be stricken from the record.

A. (Continuing.) I say it's true.

Mr. Olson: Now, if it please the Court, we thoroughly object to that. Whether it is true or whether it isn't I don't know, but it wasn't responsive.

The Court: I understand. I sustain your objection.

Q. Mr. Moreland, do you know what percentage of value you, as a Board of Equalization, place on the property throughout the county?

A. Sir?

Q. What percentage of value—

A. Twenty percent.

Q. Is that true in both Precincts 1, 2, 3, and 4?

A. Yes, at a dollar five.

[fol. 284] Q. A dollar five is your tax rate?

A. Yes.

Mr. Olson: If it please the Court, we reoffer into evidence each word, sentence and paragraph contained in the Bill of exception—

The Court: Except those which you took special exception to?

Mr. Olson: —which the Court sustained and instructed to be stricken from the record.

Mr. Pannill: We renew the objection.

The Court: All right. I sustain the objection.

Q. Now, Mr. Moreland, moving on a little bit now to this matter of the redistricting of the county. Now were you present at the time Mr. Avery presented his plan of proposed redistricting to the commissioners court?

A. Well,—

Mr. Browder: Your Honor, I would object because there were several plans presented and I think it has been shown Mr. Avery was there several times, and I don't know what time counsel is inquiring about and I doubt if the witness knows.

Mr. Olson: Now, if it please the Court, let the witness answer. He can state—

Mr. Browder: Wait just a minute. The question was [fol. 285] ambiguous and I do not know what plan or what presentation the council—

The Court: Let's let the witness answer and see whether he knows what he is referring to and then find out.

Q. Mr. Moreland, were you present in the commissioners court when Mr. Avery presented this prepared plan for a proposed redistricting of the county, as set forth in Exhibit No. 32?

Mr. Browder: I certainly have no objection to that question, your Honor.

Mr. Olson: Thank you.

A. There were so many plans there, I really don't know, sir. The first morning they were presented, the majority of the court wasn't there. They came later and there were so many plans, I really don't know. He would have to identify the one he had. I seen so many I don't know.

Q. You were here in the courtroom yesterday when he said this is the one he presented, weren't you?

A. Yes, sir.

Q. Is that the one he presented or do you know?

A. I don't know whether that is the one he presented or not.

Q. Well, have you ever seen that plan before?

A. I have seen a lot of them.

[fol. 286] Q. I didn't ask you that, Mr. Moreland. Have you ever seen that plan?

A. I don't know.

Q. Well, would you mind looking at it a little bit and tell us?

A. Yes, sir, I will.

Q. You mind or you don't mind?

A. No, sir, I wouldn't mind, no.

The Court: Let's don't speak so argumentally to the witness. Let him go ahead.

Q. Have you seen it before?

A. I don't know; I imagine I have.

Q. All right, sir. Mr. Moreland, you understand these numbers, 1, 2, 3, and 4 on here mean the commissioners precincts. You understand that, don't you?

A. Yes, sir.

Q. You understand that these black lines right here represent the city of Midland.

A. Yes, sir.

Q. And you understand that these lines as set forth here (indicating on exhibit) represent the proposed boundaries of these various commissioners precincts. You understand that?

A. Yes, sir.

Q. Now then, Mr. Moreland, looking at these various [fol. 287] proposed precincts, those are not the ones as they now exist, are they?

A. No, sir, they are not.

Q. Now, population-wise, based on your acquaintance with the county as a whole, I will ask you whether or not, population-wise, you think the areas as set forth in Exhibit No. 32, pretty well divide the county equally in population. Of course, I realize you don't know exactly, but I mean generally.

A. Coming in here and around this way (indicating on exhibit) here?

Q. Yes. See here, it comes down here and then around. You see this black is the city of Midland.

A. Yes, sir.

Q. You see and, of course, this is your line, and here is your line for 4 and then 3 and then 2. That would—I don't think there is much question but what that would pretty well divide the county. I am talking only about numerically now in accordance with numbers.

Mr. Pannill: Is he asking the witness or is he making a statement?

Mr. Olson: I am asking the witness.

Mr. Pannill: All right.

A. It looks like he is just dividing the city up and throw-
[fol. 288] ing it out in the county.

Q. So it looks like it is pretty well divided equally, so far as the county is concerned. You would agree with that, wouldn't you?

A. You want me to state how I think that would be divided?

Q. How it should be divided?

A. No, how that is divided.

Q. No, I don't want you to tell me how it is divided. I did want you to answer my question, if you don't mind.

A. Well, sir, that wouldn't necessarily divide it perfectly.

Q. I didn't ask you perfectly. I said, generally, if it would divide it equally.

A. No, it wouldn't divide it too good.

Q. It wouldn't?

A. No, sir.

Q. Well, which one would have more than which other? You just point out to me and say O. K. You say this doesn't divide equally, so you show me which one has more people and which one would have the smallest number of people.

A. Well, it looks like the way the city of Midland is drawn it would have the most people.

Q. Well, now we have got that divided, haven't we?

A. Sir?

[fol. 289] Q. Maybe you don't understand.

A. I do understand.

Q. O. K., then tell me where we are off, which one has too many people in it.

A. This one down here don't seem to have enough people.

Q. Doesn't seem to have enough people?

A. No, sir.

Q. So you think that Three is not as heavily populated as One, Four, and Two. Is that right?

A. Well, I wouldn't think so, the way the town is kicked around some, no.

Q. But you say, generally, it is pretty equally divided, wouldn't you?

A. Population-wise?

Q. Yes, sir.

A. Population-wise, yes.

Q. That is all I wanted you to say, whatever the facts are. Now then, as far as values—when I say values I am talking about property values throughout the county. You are familiar with these various deep wells, where they are located, where the gins are located, and where the refineries are, and so forth?

A. Yes, sir.

Q. Would you say that the commissioners precincts as set [fol. 290] forth in Exhibit 32 pretty generally, and, again, I am not trying to pin you down, and if it is not a fact I want you to tell me it is not a fact. Would you say that

pretty generally it divides the county into equal tax values, property values?

A. Oh, not necessarily.

Q. Well, I say but generally.

A. No, sir, I am not going to say that.

Q. Tell me how it does not.

A. You got lots of things to take into consideration when you go to dividing the county, sir.

Q. I am talking about values now.

A. Values, then. I will come to that.

The Court (to witness): Let me ask you to take your seat unless you are going to be pointing to the exhibit.

(The witness takes his seat in the witness chair.)

Q. Go ahead.

A. Your values, you have got a lot of kinds of industry,—

Q. Uh huh.

A. But mostly we know it is oil and gas.

Q. Uh huh.

A. Midland County is known for oil and gas, and the others are minor, and as far as giving the values all down [fol. 291] in here, you know, I don't know correctly up to a few dollars how all this would go and coming in here, the way it is set up, Four would have lots of value.

Q. Uh huh.

A. More so than Two, maybe, a great deal, and so far as just setting in here and asking me on a Minute book to prove the value, I wouldn't think that would be correct.

Q. You don't know—well, the city is pretty well divided and if the biggest part of the value is in the city, it is pretty equally divided there, isn't it?

A. As far as value on the whole, the city don't have all the value, no, sir.

Q. They don't have what?

A. They don't have all the value, no.

Q. I didn't say they had all of the value.

A. Well, I don't know, the way you are bringing it around there, but there is a lot of things to consider in dividing the county.

Q. Now what about the roads, Mr. Moreland? Would you say this pretty well divides the roads of the county fairly equally? You are familiar with the roads of the county, you say.

A. I have been on every one of them. Of course, sir, you don't live in this part of the country. We got lots of roads [fol. 292] and for me to circle this precinct, it is over a hundred miles the way I have to go around it. We've got lots of roads that don't connect.

Q. Uh huh.

A. County roads is what I mean. They connect eventually, but State roads come in and everything and, as far as the roads are concerned and all that nature, well, they do not connect or anything, and in order to get to them, why, these precincts right around the edge of town they are easier to get to, more so that Three or Four.

Q. Yes. But you would say that, generally, that fairly well divides the—

A. (Interrupting.) No, sir, because Precinct 1 would have just a little handful of roads the way you got that fixed.

Q. One wouldn't have as many roads as Four, Three, and Two. Is that correct?

A. No. 1 wouldn't have a handful of roads.

Q. What do you mean by a handful?

A. Just a few out here. You run out of the county here three miles north of town.

Q. How many miles would you say? Have you a judgment about how many miles of road?

A. The way that thing runs around it looks like a snake [fol. 293] crawling around, but I couldn't go from here (indicating) around through there. This is mostly all ranch land out in here and in coming here you go to hitting a few roads, but very few, and down in here south of the railroad there is very few roads.

Q. You don't have any judgment as to the number of miles of roads?

A. Sir?

Q. You don't have any judgment as to the number of miles—

A. I would say there just wouldn't be as many roads in One here as—

Mr. Browder: Mr. Moreland, you are going to have to talk a little slower and more distinct, because the judge wants to understand you and hear you and I want to hear you and understand you, also, and I am not able to understand you talk so fast.

The Witness: I am sorry.

Mr. Browder: And, Mr. Moreland, when you point, the Judge and the record wants to know what you are pointing at, so just point it out so the record will show.

Q. Now, Mr. Moreland, Plaintiff's Exhibit 31. You look at that. Are you familiar with the fact that these green lines represent the precincts as they were established on [fol. 294] August 31, 1963, effective on the 1st of January, and the red represents the precincts as they were prior to that time. Do you understand?

A. Yes, sir.

Q. Now were you present and did you take part in the decision to change or make this minor change to the precinct lines?

Mr. Browder: Now, your Honor, we object to the question because counsel terms this a minor change in August '63. That is a matter, of course, he can argue to the Court, but he is not permitted, as I understand the law, to make such assertion in a question to the witness, and I object to it on that ground.

The Court: Sustain the objection.

Q. Were you present when they made this change in August 31, changing about 12 square miles, I believe it was, in the whole county?

A. That is wrong, sir.

Q. Well, how many in your precinct—12 in your precinct?

A. Precinct 3 is 12 miles.

Q. I believe each one of those blocks represents a square mile on that map.

A. A section of land, yes, sir, is a square mile.

[fol. 295] Q. Mr. Moreland, what was the purpose of changing these lines? Could you tell me the reasoning behind the movement of these lines?

A. Yes, sir.

Q. Would you mind telling me?

A. Well, sir, we divided to give more equal roads, more population and more valuation and to better serve the people of Midland County.

Q. Did you in the 12 acres that were added to your Precinct 3, were anybody living in that area?

A. In 12 acres?

Q. Uh huh. Twelve sections.

A. No, sir, they do not.

Q. None at all?

A. No.

Q. Were there any roads in that section?

A. Yes, sir.

Q. How many roads?

A. Oh, possibly four or five miles.

Q. Mr. Moreland, how many people were—you stated no people were added to Precinct No. 3. Now how many people were added, if you know, to Precinct No. 2?

A. Well, a great deal.

Q. By a great deal do you mean a hundred or two hundred?

[fol. 296] A. Oh, no, more than that.

Q. Well,—

A. I am not a census taker and I really don't know.

Q. Well, I am sure you looked into that matter before you made a decision of approximately how many, did you not?

A. Sir, I don't know.

Q. Would you say two hundred, or you just don't know.

A. I don't know.

Q. You didn't look into it then, did you?

A. Sir?

Q. You didn't look into it?

A. Yes, sir, we know that there's a lot of people living there, but I'm not running around counting them.

Q. Well, you said that was one of the factors you took into consideration.

A. Yes, sir, we knew it would take a lot more people in there along with the roads and along with more valuation and better serve the people of Midland County.

Q. Now, how many people were added to Precinct No. 4?

A. I wouldn't know, but it was several.

Q. And you don't know there either, Mr. Moreland, do you?

A. No the number, no, sir.

Q. And the precinct lines were not changed in any way [fol. 297] so as to include a portion, part of a portion, of the corporate limits of the city of Midland. That is true, isn't?

A. We did not come in the city limits.

Q. So, actually, population wasn't too big a factor, was it, Mr. Moreland?

A. I do not think it is.

Q. Your do not think and you did not think at the time this Order was passed.

A. As far as population?

Q. Yes.

A. No, sir, and I don't think so today.

Q. And by the same token, you don't think that the number of qualified voters should be a factor to consider if you don't think people should be a factor to consider.

A. Sir, we serve Midland County to the best of our ability. The law says the value—

Mr. Olson: Now, if it please the Court, it is for the Court to decide what the law says.

The Court: I sustain the objection.

Q. So your opinion is that the number of qualified voters in a commissioners precinct is not an important factor.

A. There are a lot of factors to look at, sir.

Q. But I say that isn't an important factor. That is what you just testified to, wasn't it, population?

[fol. 298] A. Population.

Q. Yes, sir.

A. To run a county government? No, sir, I don't think that is the biggest thing, because—

Q. You don't think it is the substantial—

Mr. Browder: Wait a minute. Let him finish his answer.

A. Can I finish answering?

Q. Yes. Go ahead.

A. The thing about it is, the city of Midland has the city council and the mayor to run its business, which I wish they would, and we nave a whole county to run, and the law of Texas says that each county shall be divided into four precincts.

Mr. Olson: If it please the Court, I am going to object to him testifying what the Constitution of Texas and the law says.

The Court: I sustain the objection.

Mr. Browder: All he was saying, your Honor, is that the Constitution of the State divides the county into four precincts. Now as a commissioner he would have to know that and he—

The Court: I know that, counsel. Let's go ahead with the case.

[fol. 299] Mr. Browder: I mean, why he asked him what he considered and to explain it and I don't know how he can explain it without saying that he knew he had to divide it into four precincts. That is all I know.

The Court: All right.

Q. Mr. Moreland, you said—

Mr. Browder: Had the witness finished his answer?

The Court (to witness): Had you finished your answer?

The Witness (to Court): I was trying to tell him.

Mr. Olson: He was trying to tell what the law was, your Honor.

The Court: Let's just go back and start your question again.

Q. Now, Mr. Moreland, you said that the city shouldn't be, as I understood your answer, that the city shouldn't be considered too much in the county because they have their own council and mayor. Is that what I understood you to say?

Mr. Browder: Now, your Honor, that wasn't the statement of the witness. The witness did say the city should not be considered too much, that the city council would stand on its own, but I did not understand that answer, and I object to the question as an attempt to put words in the mouth of the witness which he didn't say.

[fol. 300] The Court: Overrule the objection.

Q. Did you say the city had its own city council?

A. They do have a city council, government and the city of Midland, which runs the city of Midland, but the county has to be cut up into four precincts in which we have it cut up to better serve the people, and you go to taking all things into consideration I think it does that.

Q. Of course, the city people are also county people. That is right, isn't it?

A. I realize that and are real proud of it. We are proud of our city service.

Q. Mr. Moreland, I have showed you Plaintiff's Exhibit 32, which is on the floor there, Mr. Avery's suggested plan for redistricting which he testified he had presented to the commissioners court, and you stated that you did not recog-

nize that plan, so I assume you did not take that into consideration in arriving at your Order of August 31, 1963. Is that correct?

A. Yes, sir, we considered all of them.

Q. But you don't remember the details of this one at all.

A. Well, so many of them looked so much alike. We laid them all out and looked at all of them.

Q. But you don't remember that plan specifically.

A. Well, don't hardly any of them vary a little bit. [fol. 301] Everyone of them brought them right in there to a little bitty focus point where the city and school is run from, and it's run from a little small area here in town.

Q. And you just rejected all of them then that did that.

A. No, sir, but we knew what they were trying to do.

Q. What who was trying to do, Mr. Moreland?

A. This little group that runs the city council plus the school board that rules a little six or seven block area here in town.

Q. What were they trying to do, Mr. Moreland?

A. I guess put the county up there with them.

Q. Well, of course, that is just an assumption on your part, isn't it?

A. Well, it is a pretty well known fact in Midland.

Q. Well known among the people in your area? Is that correct?

A. Well, you can ask anybody that lives out there if you want to. Either you don't live out there or you don't get on the council or school board.

Q. Well, of course, that's your opinion about that. Do you work anywhere other than for the council, Mr. Moreland?

Mr. Browder: Now, wait a minute.

Q. I mean other than the commissioners court?

A. Sir?

[fol. 302] Q. Do you work other than serving as a county commissioner?

A. I farm but I have some help.

Q. But you still farm—

A. Yes, sir.

Q. —and operate your farm, and what did you do prior to the time you were elected to the commissioners court?

A. I farmed.

Q. That is what you have done ever since you got out of school?

A. Yes, sir.

Mr. Olson: That is all we have.

* * * * * * *

[fol. 351] Redirect examination.

By Mr. Olson:

Q. Mr. Moreland, I believe you testified that one of the prime considerations that made you arrive at this redistricting was that you thought a commissioner could better serve an area or that you could better serve Precinct 3 if you lived down in the precinct. That was your statement, wasn't it?

A. Yes, sir.

Q. Of course, you understand, Mr. Moreland, that if you had adopted the plan proposed by Mr. Avery you could still live down in the precinct?

A. Sir?

Q. If the plan proposed by Mr. Avery had been adopted, you could still live down in the various rural areas of the precinct, couldn't you?

A. If I lived in Four?

Q. Regardless of the precinct number, if you lived down in the area of Precinct 3, if we switched the numbers around and you come in any of the precincts, you could have still lived down in the rural area, couldn't you?

A. Yes.

Q. If Mr. Avery's plan had been put into effect dividing the population so that each precinct had, roughly, a fourth

[fol. 352] of the city of Midland, where you stated the main population was, you could still live in the far part of the county and still serve in Four?

A. Yes, sir.

Q. You could live in the far end of the county and still serve Precinct 2?

A. Yes, sir.

Q. You could serve Precinct 3?

A. Yes, sir.

Q. You could live in the far end of the county and still serve Precinct 1?

A. Yes.

Q. I will ask you whether or not the commissioners court, in arriving at the redistricting, took into consideration the Negro population in the community?

A. Sir?

Q. My question was, if the commissioners court, in arriving at the redistricting, took into consideration the Negro population of the community.

A. Yes, sir.

Q. Did you take into consideration that, if the county had been divided at the point, of the possibility a Negro would be elected?

A. They can run at this time.

[fol. 353] Q. Just answer my question, Mr. Moreland. I say, did you take into consideration that if it was divided, as proposed by Mr. Avery or by some other of the propositions we have been talking about here today, that a large part of the population would be in one precinct and you would be afraid you would have a Negro elected at the polls. Was that discussed at the hearings?

A. I don't remember that it was.

Q. Would you say that it wasn't?

A. I don't remember.

Q. It may have been discussed and you not remember?

A. It could.

Q. Would the fact that the division proposed by Mr. Avery might have effect on the wet and dry condition of the county discussed?

A. Yes, sir.

Q. You did take that into consideration.

A. Yes, sir.

Q. Tell me about it.

A. Precinct 2, County Commissioners Precinct 2, is the only county precinct in Midland County which is dry at this time.

Q. All right?

A. And Greenwood, what is in Precinct 2, those people, [fol. 354] I don't think, approve of and use liquor.

Q. Of course, those people made that choice and not the commissioners court, didn't they?

A. Sir?

Q. They made the choice as to whether they would be wet or dry, didn't they?

A. As long as it was much that way, it would stay that way.

Q. You took into consideration all those things and the effect it would have as to whether it would be wet or dry and the possibility of it going either way.

A. Yes, sir.

Q. But you don't remember whether or not you considered the fact about the Negro population. You don't say you did or didn't. You just don't remember, do you?

A. No. They can run a commissioner now if they want to.

Q. I understand that. You appreciate the way the lines are drawn up can have a different effect on the Negro voting power. You understand that, don't you?

A. I don't believe the way it is divided there would throw all the Negro population in one precinct.

Q. I am not saying it would or would not, but that is one of the things you took into consideration, wasn't it? The Negro population is largely centered in one area?

[fol. 355] A. The south part of town, southeast and northeast.

Q. In this proposal of Mr. Avery, would your Negro population be predominantly in any of the precincts?

A. In Two and Three.

Q. It would be predominant in Precinct 3?

A. A town the size of Midland.

Q. You know where Cuthbert Street is?

A. Yes, sir.

Q. Assuming it went down through Cuthbert.

A. How would it go through?

Q. Right straight through.

A. East.

Q. Yes.

A. It would go into Three.

Q. Mostly, though, in Two, wouldn't it?

A. No, Three would catch the most.

Q. As it is now, all your Negro population is in Precinct 1?

A. Yes. No, not all.

Q. The biggest part of them are, though. Isn't that right? By far, the largest number of them?

A. Yes, sir.

Q. Now, Mr. Moreland, you said that the—you keep talking about the roads and took that into consideration so you [fol. 356] could live out there and watch over the roads. Did you say earlier that you didn't have any designated road fund for any precinct but put it in one pool and used the funds throughout the county?

A. Yes, sir.

Q. And you try to use it so that each precinct gets so much a year.

A. Yes, it takes more sometimes in one precinct than in others.

Q. You stated that primarily the commissioner from Precinct 1 handled city problems. You don't do any street maintenance inside the city?

A. No.

Q. What city problems are you talking about?

A. Well, if something was needed by people concerning the cemetery, they might call Mr. Bryant and also call us sometimes.

Q. Where is the cemetery?

A. About, I would say, ten blocks north of the courthouse.

Q. Within the corporate limits of the city of Midland?

A. Yes, sir.

Q. Did you say something about—I missed a little bit of your testimony because of the acoustics in here. I don't mean that critically, Mr. Moreland, but I missed some of it. [fol. 357] Did you say something about Little League? Did I hear you say, you know,—do you use any funds for Little League?

A. No, sir, you don't use county funds for Little League. It is a ball field up here beside the cemetery there that we do let them use the land.

Q. You do what?

A. We let them use that land.

Q. It belongs to the county—

A. Yes, sir, that's right.

Q. —and the Little League uses the land for playing baseball.

A. Yes, sir.

Q. Little League baseball. Who maintains that land for the Little League ball park?

A. The county and city. Mr. Gideon can tell you more about that than I can.

Q. You don't know?

A. He works with the Little League here. I work for the Little League in my precinct.

Q. At where?

A. In my precinct.

Q. Well, does the county have some property that they use for Little League in your Precinct 2?

A. No, sir, they do not.

[fol. 358] Q. You have a boy in the Little League?

A. I have some boys, yes, sir.

Q. And work with them. Yes, sir, I do, too. Did I understand you to say that you weren't in favor of making any changes at all? You like the old plan, and you don't want to change it at all but you went along with these other commissioners?

A. At first, yes, sir. I have a terribly large precinct.

Q. There are so many exhibits here I will try to help you find the one you are looking for. Is this the one you wanted to show me?

A. I was just going to show you that. As I say, I had the largest precinct. They all know it.

Q. Largest in area?

A. Yes, sir.

Q. But not the largest in population.

A. No, sir, it isn't.

Q. All right, show me what you wanted to, Mr. Moreland.

A. Well, the old precinct lines was to leave them as they were.

Q. And you were in favor of doing that rather than making these what I call minor changes that were made.

A. Well, I don't really call them minor, sir, but—

Q. Well, changes.

[fol. 359] A. All right, the thing about it is I had the largest precinct in area and it is large to cover, and I thought it was more fair and I could better serve it the way it was, yes, sir.

Q. But you were opposed to enlarging your precinct, take any portion of the city of Midland, and you are still opposed to it at this time?

A. Yes, sir, I am.

Q. Now, Mr. Moreland, you said you had a large area and you were in favor of this because it cut off some of your area. How many miles of roads did it cut off? Isn't it a fact that it just cut off about three or four miles?

A. What's that?

Q. Huh?

A. What I took on?

Q. Roads, yes, sir.

A. Right here? (Indicating on map.)

Q. Uh huh.

A. It just added on, I believe, about one, two, three miles, three or four miles. You see, it was a dividing line there. It's a road that runs through, sir.

Q. Well, actually, you—rather than cutting down on your miles, it put more road miles in your precinct, did it not? [fol. 360] A. It put two or three more, yes, sir.

Q. In other words, it put about three more miles, at least three more miles, for you to maintain in your precinct, this new Order.

A. Yes, sir, but at the time Mr. Gideon says, "If you do not want to move yours, that is all right." I said, "Well, it will help you out some. I will."

Q. If you don't want to move your what?

A. Don't want to move—don't want to take this in, he said it would be all right with him.

Q. Well, was Mr. Gideon one that proposed this plan?

A. No, sir.

Q. Who proposed it?

A. Well, Mr. Osborne, I believe, made the motion.

Q. Did he bring in the plan?

A. Sir?

Q. Did he bring in the plan?

A. I believe he did.

Q. Did he prepare it himself, or do you know?

A. I do not know.

Q. Did you consult any engineers, consult any statistics as to population prior to the adoption of this plan?

A. We don't run the county according to population, sir.

Q. And you didn't take into consideration any study, [fol. 361] didn't make any study or attempt to make any study about population in the various precincts?

A. Yes, sir, we sure did.

Q. Well, where are those studies?

A. Sir?

Q. Where are those studies?

A. We just made them.

Q. You haven't got them with you?

A. No, sir.

Q. You haven't got any figures?

A. I don't have them myself.

Q. Isn't it a fact that study showed that about 95 per cent of the population resided within Precinct No. 1?

A. That is all hearsay, sir. I do not know.

Q. You didn't make the study?

A. Sir?

Q. That is about right, isn't it? Wouldn't you say it is about right, that about 95 percent of the population of Midland County resides in Precinct 1?

A. I haven't counted it but, like I told you at the start, I didn't want to argue with you, but we all know that the population is in the city of Midland.

Q. And you are not going to argue the fact that 95 or 97 percent of the people reside in Precinct 1?

[fol. 362] A. I wouldn't know percentage-wise, the actual percent.

Q. Did you make a study as to the change in valuation in your precinct as a result of changing these lines?

A. Pritchard & Abbott and Mr. Dean can come up with that.

Q. I say, did you?

A. Sir?

Q. Did you? You are the one that passed the Order and you are the elected commissioner. Did you make a study about the effect this redistricting would have on your tax values in each district?

A. Well, sir, it's just there plain to see.

Q. Well, did you make a study?

A. Yes, sir, in a—

Q. (Interrupting.) Have you got that study?

A. No, sir, I don't have it.

Q. Well, who has it?

A. I do not know.

Q. Well, was one presented in writing to the commissioners court or to any individual member of the commissioners court that you know of?

A. I tell you what kind of study we made, sir. We went and looked and seen what would be put in there and we all know that well and we could kind of tell what kind of value they might place on it. We didn't know the exact value they [fol. 363] would raise, but we did know that it would raise a great deal of value.

Q. Well, did you go to the tax rolls and check what any of this was valued at prior to the time of the adoption of this Order?

A. Sir, we know on the Board of Equalization what a lot of this property is valued at.

Q. Well, all right, based on your past experience then, you say you took that into consideration, how much additional value was placed in your precinct as a result of the Redistricting Order?

A. In my precinct?

Q. Yes, sir.

A. Very little.

Q. How much?

A. Very little.

Q. All right, how much was taken away?

A. Not any.

Q. None? All right, how much additional value was placed in Precinct No. 4?

A. I wouldn't know, sir.

Q. You just don't know, and you didn't know—

A. Exactly. You can just see a lot of value would be placed there, sir.

[fol. 364] Q. Well, approximately how much?

A. I wouldn't know, because you just can see it would be there and we would know it would be more valuable, but we are going to operate all our funds together.

Q. But you don't know how much and you didn't know how much at the time this Order was adopted.

A. No, sir, not the exact figure, no.

Q. All right, what about Precinct No. 1? What effect did the change in the boundary lines have on the population in Precinct No. 1?

A. It had some change.

Q. Well, how much?

A. Well, I really don't know, as I told you this morning.

Q. You didn't make a study and you don't know.

A. I didn't go count it house by house, sir, I sure didn't.

Q. All right, what effect did the redistricting have on the values in Precinct No. 1?

A. It took some away.

Q. Sir?

A. It took some of it away.

Q. How much?

A. I do not know, sir.

Q. You don't know now and you didn't know in August of [fol. 365] 1963. Is that correct?

A. No, sir, not the exact amount, no, sir.

Q. All right, what about Precinct No. 2 and what effect did the change have on the population in Precinct No. 2?

A. I would imagine it increased it three or four times.

Q. Three or four what?

A. Three or four times.

Q. All right, how much is three or four times?

A. I didn't know what the exact figure was down there to start with.

Q. Well, give me your best judgment.

A. Well, I just don't know, sir.

Q. Well, you have an opinion. Is it a hundred or two hundred or a thousand, or what is your best judgment?

A. Less than a thousand; of course, less than a thousand.

Q. Sir?

A. It was less than a thousand, yes.

Q. Less than a thousand.

A. Sure.

Q. Were added or taken away from it?

A. It was less than a thousand people there, and I don't imagine there was that many people added.

Q. In other words, there was less than a thousand and—. All right, what about values? Did you take into considera-

[fol. 366] that in regard to Precinct No. 2?

A. Sure, it would place more value on it.

Q. How much values were added to or taken away from Precinct No. 2?

A. I don't know and I doubt whether the tax assessor knows at this time yet.

Q. Well,—

A. He hasn't got all the rolls brought up.

Q. Did you ask the tax assessor to get these figures together and bring them to you?

A. No, sir, I don't tell the tax assessor what to do.

Q. And you don't have those figures available now and you did not have them in August of 1963.

A. Sir, the kind of study we made was just a look to see kind of what was there. We went and looked and we figured on how much was there and how much more convenient it would be to the people it—just that way.

Q. You made kind of a horseback survey, then. Is that right?

A. Well, I don't think there is anything wrong with a horseback survey.

Q. Well, you made it from an automobile, didn't you, Mr. Moreland?

A. Yes, sir, we did.

[fol. 367] Mr. Olson: I believe that is all we have right now, your Honor.

* * * * * * *

[fol. 374] LOUIS OSBORNE, called as a witness by the plaintiff, after first being duly sworn, testified as follows:

Direct examination.

By Mr. Olson:

Q. State your full name, please.
A. Louis Osborne.
Q. You are the same Louis Osborne that is a defendant in this lawsuit?
A. Right.
Q. Is that correct?
A. Right.
Q. What is your address, Mr. Osborne?
A. West Highway 80.
Q. Where?
A. Midland.
Q. In Midland County, Texas?
A. Right.
Q. You have before you there on the easel Plaintiff's Exhibit 31, I believe, that shows the boundaries of the old [fol. 375] commissioners precincts and the new commissioners precincts. Would you point out to the Court and indicate by reference for the benefit of the record about where you live. I believe the pointer is there in front of you.
A. This won't miss it very far right here, three blocks off Highway 80 (pointing on the exhibit).
Q. You are indicating—what are you, some two or three miles east of the county line?
A. Three miles west of Terminal.
Q. Mr. Osborne, you are a member of the commissioners court of Midland County, Texas. Right?
A. Yes, sir.
Q. Do you have any other occupation?
A. Grocery store, a little mama and papa operation.
Q. Is your grocery store at your home?
A. Next door.

Q. How long have you been a member of the commissioners court of Midland County?

A. Since January 2, 1963.

Q. How many votes did you receive at the time you were elected to this position, Mr. Osborne?

A. I couldn't give you an exact count. I could go get it.

Q. I have some information before me that indicates you [fol. 376] received 79 votes. Does that sound about right?

A. It sounds pretty close.

Q. And that you had no opponent. Is that correct?

A. No, it is not correct.

Q. You did have an opponent?

A. Had four in the primary and it ended up in a runoff.

Q. Well, I was referring here to the general election in November. Did you have a Republican opponent?

A. No, I didn't have a Republican opponent.

Q. But in the general election you received 79 votes? Does that sound about right to you?

A. I guess that is about right.

Q. Now this area that you indicated as the place of your residence and your business out there on Highway 80, Mr. Osborne, is that kind of a populated little area out there?

A. It's building.

Q. Sir?

A. It's building pretty fast.

Q. It's building pretty fast?

A. Yes, sir.

Q. How close is your closest neighbor?

A. Oh, 75 yards, straight across the street, whatever width that is.

[fol. 377] Q. Mr. Osborne, at the time you became a member of the commissioners court of Midland County, this lawsuit we are involved in now was pending. Is that not correct?

A. That is right.

Q. The complaint at that time was that there should be a redivision of the commissioners precincts of Midland County, Texas.

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. From the time you came on to this commissioners court on January 1, 1963, until a plan was adopted by an Order of the commissioners court on August 31, 1963, this was one item of business that pended before the commissioners court. Is that correct?

Q. Now as to your duties as a county commissioner, without going into great detail here, the commissioners court is the governing body of the county of Midland. Is that correct?

A. Yes, sir.

A. Of Midland County, yes, sir.

Q. You buy county equipment?

A. Yes, sir.

Q. And you adopt a budget?

A. Yes, sir.

[fol. 378] Q. You determine the distribution, if any, of the Road and Bridge Funds of the county?

A. Yes, sir.

Q. You authorize the sale and issuance of bonds, if any have been voted?

A. Yes, sir.

Q. And expenditure of funds, of bond funds, for the construction of public work.

A. Yes, sir.

Q. County work. You let contracts for such purposes?

A. Yes, sir.

Q. You set the tax rate?

A. Yes, sir.

Q. What is the tax rate?

A. Dollar five, or 20 percent of the value is a dollar five.

Q. Sir?

A. Twenty percent of the value at the rate of a dollar five.

Q. Is that 20 percent of the reasonable cash market value?

A. Well, let's see. State that again.

Q. You said 20 percent was the assessed value. Is that 20 percent of the reasonable cash market value?

[fol. 379] A. Well, I don't think anybody knows what the reasonable cash market value would be.

Q. All right, tell me what it is. Twenty percent of what?

A. Of the value, what it would produce.

Q. What it produces?

A. What the property would produce.

Q. What do you mean what it would produce? You mean if you had farm land how much cotton it would produce? Is that what you are talking about?

A. Yes, or pasture land.

Q. How many cows the pasture land would produce? Is that right? Is that how you arrive at value of land?

A. Part of it, yes, sir. Part of what you can sell.

Q. What else?

A. I don't know whether I understand just exactly what you mean.

Q. All right, what if you got ten acres out there that doesn't produce anything. How do you arrive at value?

A. Well, it wouldn't have much value.

Q. Wouldn't have anything, any value, and you make your assessments on that basis when you sit as a Board of Equalization. Is that right?

A. Well, I don't think we have ever found anything that [fol. 380] didn't have any value to it.

Q. Well, you've got some land out here that doesn't produce anything, don't you?

A. We have got some that don't produce much.

Q. Well, do you have some that doesn't produce anything?

A. No, I don't know of any like that.

Q. All right. But you arrive at value on what land produces. All right, sir. You also call certain elections, can-

vass the returns, appoint the election officials, canvass the returns and declare the results of the election, and so forth.

A. Yes, sir.

Q. And as part of your duties as a member of the commissioners court, you establish election precincts.

A. Yes, sir.

Q. Don't you?

A. Yes, sir.

Q. And justice of the peace precincts.

A. Yes, sir.

Q. And commissioners precincts.

A. Yes, sir.

Q. Have you got a constable out in Precinct 4?

A. No, sir.

Q. Have you got a justice of the peace?

[fol. 381] A. No, sir.

Q. Have you got a man right now who was nominated in a Democratic primary as constable for Precinct 4?

Mr. Browder: Your Honor, I object to that as immaterial and irrelevant on the question of subdividing this county, whether it is within the discretion or whether the commissioners exercised their discretion.

The Court: I sustain the objection.

Mr. Olson: May it please the Court, may I approach the bench?

The Court: Yes.

(Counsel for plaintiff and defendants approach the bench, converse with the Court, and then take their seats.)

The Court: I will sustain the objection, and you may have your Bill.

Q. All right, Mr. Osborne, I will ask you: isn't it a fact that a man—I believe his name is Fred Koonce—was nominated in the Democratic primary for the office of constable of Commissioners Precinct 4?

A. Yes, sir.

Q. And isn't it a fact that about the time he was announcing for public office out there for this position that you went by to see him and asked him to come before the [fol. 382] commissioners court?

A. Yes, sir.

Q. And he came before the commissioners court, didn't he?

A. Yes, sir.

Q. And you told him at that time "you just better save your money and not get into this race because there is just not enough people out here, there's just not enough business, to justify a constable in Commissioners Precinct 4." Now that is what you told him, wasn't it?

A. I didn't tell him that.

Q. Did someone tell him that?

A. I don't know what somebody told him, but I didn't tell him that.

Q. You didn't hear anybody tell him that. Is that your testimony?

A. That's right. Could I tell you what I told him?

Q. Well, let me ask you—yes, go ahead and tell us what you told him.

A. One reason we don't need a constable out there was straight across and angling across the street from me, why, I got a captain of the State Rangers over there.

Q. You got what?

A. Captain of the Texas State Rangers, and then directly [fol. 383] behind me I got a deputy sheriff building a new home back there, and then about 300 yards, for other protection, we have got a deputy state Ranger and cattle inspector, so we are pretty well protected out there. The Highway Patrol is in and out of that place there every day, a deputy sheriff patrols it twice a night.

Q. All right, but it is your testimony that neither you nor any member of the commissioners court in your presence told this man, Fred Koonce, "you just better save your money because we haven't got enough people or business out here to justify a constable."

A. I don't remember ever hearing anybody talk to him about people.

Q. Well, did they say "there's just not enough business out here to justify a constable"?

A. Why, I don't know of any business that they would have out there.

Q. Well, did you hear anyone make such a statement or did you make such a statement?

A. I didn't make such a statement.

Q. Did you hear anyone make such a statement?

A. I don't believe I did.

Q. Well, are you sure—

A. There was a lot of talk about it.

[fol. 384] Q. Are you sure?

A. Sure of what?

Q. That no one made such a statement in your presence.

A. That there wasn't enough people out there or enough business?

Q. That there wasn't enough business to justify a constable.

A. I didn't hear anything like that.

Q. Mr. Osborne, I refer you there to Plaintiff's Exhibit No. 31 again, showing the boundaries of the commissioners precincts as they existed prior to January 1, 1964, and as they have existed since that time, and the outline of the city of Midland. How long have you been a resident of the county of Midland?

A. About nine years.

Q. Are you acquainted with this terrain? Have you traveled over it? Do you know the lands of the county?

A. Pretty well.

Q. Do you know the people of the county pretty well?

A. Know most of them.

Q. Do you know the populated areas of the county?

A. Pretty well.

Q. You know it is a fact, do you not, that a vast majority of the people of Midland County, Texas, do now and

[fol. 385] have for many years resided within the corporate limits of the city of Midland?

A. Yes, sir.

Q. Now this Order adopted on August 31, 1963, I believe, was submitted by you. Is that right? This division in commissioners precincts?

A. Yes, sir. We finally adopted that one.

Q. Now, did you prepare it?

A. Yes, sir.

Q. All right, in preparing it you left all the corporate limits of the city of Midland, except Terminal out there, in Commissioners Precinct No. 1, did you not?

A. Yes, sir.

Q. And you knew in so doing that you were leaving a large percentage of the population of the county in Commissioners Precinct No. 1.

A. Yes, there's still a large part of it in there, yes, sir.

Q. And you knew that you were leaving a vast majority of the qualified voters in Commissioners Precinct No. 1.

A. Yes, sir.

Q. You knew all those facts.

A. Yes, sir.

Q. Population just wasn't a consideration in the sub-
[fol. 386] mission of this plan by you and your vote for its adoption.

A. Yes, population was. Population isn't the only thing you look at.

Q. All right, but population wasn't really a factor, was it, with you?

A. Well, it is one of them that you have to consider.

Q. But you didn't consider it very strongly because you just testified that a vast majority of the people lived up there in Commissioners Precinct—

Mr. Browder: Your Honor, I object to that as argumentative. He said, "You didn't consider it very strongly because" many of the people are there. Now that—

The Court: I sustain the objection.

Q. All right, tell us just to what extent this population distribution of the county was a factor in your consideration and your proposal and your vote for this plan.

A. Well, from my—I travel all four every week and sometimes I am over it twice a week. Well, I knew one little area that it would take in up there and the roads, area, and tax value, and took in about—it's about doubled its population.

Q. About what?

A. About doubled it.

Q. When you moved the boundaries of Commissioners [fol. 387] Precinct 4 over there, from the red to the green line, you about doubled the population of Commissioners Precinct 4? Is that your testimony?

A. I never have count it exact, but roughly thinking about it, it wouldn't miss it far either way.

Q. All right, what would you say the population is out there in the commissioners precinct right now, Commissioners Precinct 4 at the present time?

A. I never did count them.

Q. Well, do you have any idea?

A. Not very close.

Q. What is your best estimate?

A. What you mean "best estimate"?

Q. Well, based on your knowledge of the people out there —you say you travel it frequently—how many people do you think now reside in Commissioners Precinct 4 since the change?

A. Well, I'd have to do a little figuring for you there in counting them.

Q. Would you say 500?

A. No, more than that.

Q. 600?

A. No, more than that.

Q. Well, how many?

A. I told you I didn't know.

[fol. 388] Q. A thousand?

A. There is over a thousand.

Q. Over 2,000?

A. No, I don't believe there's 2,000.

Q. How about 1500?

A. Well, if you want to split the difference there, that might be about it.

Q. You don't really know.

A. Not exactly.

Q. But you testified the population was a big factor in your consideration in dividing the county.

Mr. Browder: Now, wait just a minute. Let us keep this straight. I object to that, your Honor, because I don't believe he said that population was a big factor.

The Court: I sustain the objection.

Q. All right, did you or did you not testify that population was a factor—

A. That's one of them.

Q. —in the division of the county?

A. That's one thing you consider.

Q. All right, let's talk about that one for a while. How many people live over there in Commissioners Precinct 2 as it exists now?

A. I don't know. He can tell you that.

[fol. 389] Q. How about County Commissioners Precinct No. 3?

A. He could tell you that better than I could.

Q. You don't know?

A. No.

Q. You are not sure over in Commissioners Precinct No. 4?

A. Not exactly.

Q. How about Commissioners Precinct No. 1?

A. Not exactly.

Q. Well, how many would you say? Do you have any idea?

A. I wouldn't even attempt to guess at it.

Q. So you don't know now—

A. I can get those figures.

Q. Did you know back in August 1963?

A. Not exactly, but I could get those together for you.

Q. That was the extent you considered population then. You just didn't know but it was a factor.

A. Well, that's just one of the things that you talk about.

Q. All right, we are talking about that right now, Mr. Osborne. If you will, I would like to refer you over there to Plaintiff's Exhibit No. 32, down on the floor, and I believe that has been identified as the proposals submitted to the commissioners court by Mr. Hank Avery in July or [fol. 390] August of 1963 prior to the time you adopted the Order dividing the commissioners precincts. Now, based on your knowledge of the county, under that plan would you not say that there was a substantially equal distribution of the people in the county into the four commissioners precincts?

A. It might have done something to population.

Q. Well, it is about equal, isn't it, based on your knowledge of the population of the county?

A. It split the town right in the middle two ways, up and down.

Q. That's where all the people live, isn't it?

A. Yes, sir.

Q. All right, would you say that there was a fairly equal distribution between those four commissioners precincts as to value of property?

A. The way that is cut up there, I don't know. It would take a lot of study to figure the values there.

Q. Well, does it—

A. It is zigzagged. It would be a lot of confusion.

Q. You don't know?

A. Know what?

Q. Whether it would or would not be a fairly equal distribution of the property values of the county.

A. Well, I don't believe it would be.

[fol. 391] Q. All right, in making the division of the county that you submitted and that was adopted, did you take into consideration the property values in the county?

A. Well, each one pretty well knows what he's got, and we did consider it, yes, sir.

Q. Sir?

A. And we did consider it.

Q. Did you make a study of it?

A. No, we didn't just hire an engineer and sit down and value the whole thing.

Q. You didn't talk to anybody, you just took into account what you thought you knew about it. Is that right?

A. We talk to people every day.

Q. I am talking about value; I'm not talking about people.

A. We just didn't see the idea of spending the money that it would take to get somebody to come in here and study the whole thing out.

Q. So you really—

A. From what knowledge we had of our own of what each man's own values and everything, why,—

Q. So you really didn't consider values, then, in submitting and voting for this plan that you submitted back in August of 1963.

[fol. 392] A. Yes, sir, values were considered.

Q. But you testify you didn't make a study of those values.

A. I don't guess we did make a study if you wanted an engineer's report on it, and everything.

Mr. Olson: Pass the witness.

* * * * * * *

[fol. 400] Redirect examination.

By Mr. Olson:

Q. Mr. Osborne, you testified that, as a county commissioner, you represented all of the people of the county.

A. Well, I work wherever they need me. If they need me in Two, well, I got out in Two. We all work together, but I am elected from Four.

Q. I believe you testified that you submitted this plan and you voted for it because you thought it was for the convenience of all the people of the county. Is that right?

A. Yes, sir.

[fol. 401] Q. Do you think it is convenient for the people of Commissioners Precinct No. 1, containing many, many times the number of people in all of the other commissioners precincts combined, to be represented by one member on the commissioners court, and the small number of people to be represented by three? Do you regard that as convenient?

A. Yes, sir.

Q. Will you tell us why?

A. Well, talk about roads; I think that a man who is out here with them and on them and has to travel them to go to town, no other way to get in but that, well, I think he has more knowledge of what is going on out there, and, when he has got the problems that come up out there among his people, why, he's right there with them.

Q. And you give more regard to roads than you do to people?

Mr. Browder: Now wait. Your Honor, I object to counsel interrupting him unless he is through, and it didn't appear to me that he was.

Q. I beg your pardon, Mr. Osborne, if you weren't. Were you through?

A. Well, I am not right sure where I was.

Q. All right, we will try to start again. You think it is more important to consider roads than consider people. [fol. 402] Is that your testimony?

A. No, I don't think you forget people, but people is just one thing that is considered in this. Roads is our big item.

Q. But you do consider it convenient for the people to have the vast majority of the people of Midland County

in one small commissioners precinct, represented by one member on the commissioners court. Is that correct?

A. Now state that again.

Q. Do you consider it convenient for the vast majority of the people of Midland County to reside in Commissioners Precinct No. 1, to be represented by one member of the commissioners court?

A. Well, I don't see that there is inconvenience.

Q. All right. Now referring you over there to Mr. Avery's plan again, Plaintiff's Exhibit No. 32, a minute ago you testified about city commissioners and county commissioners. Just because the city and the county might divide it, as suggested by Mr. Avery there, wouldn't preclude you residing out on Highway 80 there from being elected commissioner from that precinct, would it?

A. Yes, I believe it would.

Q. You would be eligible for the office, wouldn't you?

A. I'd be eligible, but you'd never get there.

[fol. 403] Q. And if you could convince the people you were the best man, you would probably be elected, wouldn't you?

A. I don't believe you'd ever get there from out there. We have had a little taste of that.

Mr. Browder: Now, your Honor, I resubmit the question I asked. I asked your Honor to take the question and the answer. That is right in line with what I gave. Without going back into it, I just ask you to take cognizance of it.

The Court: I believe the answer was unresponsive to the question.

Mr. Browder: I think it was just as responsible as it could be and, your Honor, I submit to you it was because the question was "Could you be elected if you lived in the country?" The witness said you couldn't and I know you couldn't and the only testimony before you is that you couldn't.

Mr. Olson: If it please the Court, counsel is not under oath whether he knows he could or whether he couldn't.

Mr. Browder: Well, the Court is not going to take my statement as testimony.

The Court: All right, if you want to make a motion to strike that phase of it, I will—

Mr. Browder: (Interrupting.) I don't. I asked your [fol. 404] Honor if he is going to ask the question and if it is to be held admissible for the plaintiff, then let us both—

The Court: (Interrupting.) Are you objecting to the question?

Mr. Browder: No, sir. No, sir, I think it is admissible. I would just like to ask the same question, your Honor.

Q. I believe you testified, Mr. Osborne, that you felt like, before this Order was adopted, something needed to be done about realigning the commissioners precincts in Midland County. Is that correct?

A. Did I realize that something should be done?

Q. My recollection is that your testimony was that you felt like something should be done to realign the commissioners precincts of the county prior to the time you did so in August of 1963.

A. Well, we didn't know it until we had those hearings. That was the purpose of the hearings, to see what the people—see if they still wanted it, so we had them.

Mr. Olson: That is all.

* * * * * * *

[fol. 534] ALVEY BRYANT, one of the defendants, after first being duly sworn, testified as follows:

* * * * * * *

[fol. 564] Cross examination.

By Mr. Olson:

Q. What is your educational background, please, sir?

A. High school.

Q. Where did you graduate from high school?

A. It was known then as Prairie Lee.

Q. Sir?

A. Prairie Lee was what it was known then as. It is known now as Greenwood.

Q. All right. When did you graduate from high school, Mr. Bryant?

A. 1933.

Q. 1936?

A. '33.

[fol. 565] Q. And you have been a county commissioner how long?

A. Since 1951, January.

Q. Prior to the time you became county commissioner, did you have any special training or education in road work, road construction, road designing and road maintenance?

A. Not roads. I did equipment and engines. Before the war I went to San Antonio and went to school five nights a week, three nights three hours per night, and got what we called then a degree in aircraft engine repair. During the war I was in charge, foreman, of the engine installation, in direct charge of all the engines on Midland Army Airfield, or what is now known as Terminal, Texas. That was during the war.

Q. Your training and your experience in road construction and road maintenance, and so forth, has been gained as a county commissioner of Midland County, Texas. Is that correct?

A. The biggest part of it was. Of course, I observed the road work as I lived in the rural area before I was commissioner.

Q. Yes, sir, I understand that. Mr. Bryant, do you recall how many votes you got at the general election in 1962?

A. No, sir, I don't remember exactly.

Q. I have a record before me here that indicates you [fol. 566] received 54 votes. Does that sound about right?

A. What year now?

Q. At the general election in 1962.

A. That's probably right. We didn't have any Republicans to run against us and there was a small vote in the general election.

Q. This information I have also indicates there was a total of 81 votes cast. Does that sound about right?

A. I believe that's right.

Q. Do you recall how many votes you got in the Democratic primary that year?

A. No, sir, I do not.

Q. Was it about 44? Does that sound about right?

A. I would say it is close to right.

Q. Mr. Bryant, you, of course, having been on the commissioners court since 1951 or 1952, you are familiar with all facets of the controversy we are engaged in now over the redividing of the county into commissioners precincts, are you not?

A. Pretty well.

Q. You have attended these various hearings and you have discussed this with other members of the commissioners court, and so forth, over these some 10 or 12 years, have you not?

A. Yes, sir, I have.

[fol. 567] Q. Now, back in September of 1962, you recall that Mr. Avery came before the commissioners court and requested the court at that time to redivide the county into commissioners precincts. You remember that, don't you?

A. He did come before the court and bragged on us very highly for our past work, and then asked us to redistrict the court.

Q. He bragged on you first, you say?

A. Yes, sir.

Q. Have the factors that you took into consideration at that time and subsequently until you adopted this order and what you should consider in redividing the county changed any?

A. State that again, please.

Q. Have the factors to be considered in redividing the county into commissioners precincts changed any from

back in September of '62 up until the time you adopted this Order?

A. Yes, sir, it has.

Q. Would you tell us how?

A. By the study that was made of all the people that appeared at these hearings, their evidence they presented and the reasons why it should or should not be redistricted.

Q. You didn't think those matters were important when the controversy first began. Is that right?

[fol. 568] A. Well, at that particular time the court ourselves had from time to time considered it and weighed the evidence that we knew and the people we talked to had told us, and, of course, any information that you can always obtain is important.

Q. Were you considering all these factors that you outlined this morning even back in '62?

A. No, sir. As I say, we were considering the evidence that the commissioners, ourselves, had and the people we talked to from time to time and mainly the people that we talked to on the redistricting, or that I talked to on the redistricting, were citizens of the city of Midland. I didn't take into consideration anything we had at these hearings back there at that time except maybe some of the same things do come along on the same line of thinking.

Q. The only thing you originally considered is what some of the taxpayers out there told you. Is that right?

A. No, sir. I stated that the commissioners, ourselves, from time to time talked about redistricting Midland County, the pros and cons of what each one of us thought of it, and then I particularly talked to several citizens and friends here in the city about what they thought of redistricting and what they thought I, as a member of court, and how I should vote on redistricting, and 90 percent of [fol. 569] the people I talked to, up until we had the hearings, did reside here in the city of Midland, of my good friends.

Q. Mr. Bryant, isn't it true that on or about September 24, 1962, that you made a statement, the following state-

ment, in the presence of Mr. Cope Routh of Midland, talking about this matter, and you said it would be up to the taxpayers in your district to determine whether the district court lawsuit would be opposed, and then went on to say, talking about redistricting the county, "If we didn't have some big taxpayers in our district, taxpayers who live in Precinct No. 1 backing us, we wouldn't have fought it this long"? You made those statements, did you not?

A. Yes, sir, along those lines of speaking there, not the exact words.

Q. You also said, "I'm going to contact those taxpayers and see what they want to do. I'll see what they want to do. I'll see what they want and that will determine my route."

A. Yes, sir, I did. As I told you previously, I have talked to citizens and taxpayers of Midland County on this subject for the last 10 years.

Q. But you said you were going to contact those big taxpayers in your district who lived over in Precinct 1 and, whatever they wanted to do, that would determine what route you followed.

[fol. 570] A. I didn't say that I would contact the big taxpayers.

Q. But you—

A. I did say, after I talked to taxpayers in Midland County I would then decide which route I wanted to take and how I wanted to vote.

Q. You didn't say, "I'll see what they want and that will determine my route"?

A. I said that I would talk to them and see what they wanted and then I would make my own conclusion and how I wanted to vote in this matter.

Q. All right. Mr. Bryant, I believe that in addition to your occupation as a member of the commissioners court that you are also a farmer and a rancher. Is that correct?

A. Yes, sir.

Q. What size place do you own?

A. I own five sections of land. It is about one section of farm land and about four sections of grass land.

Q. Is it all out in Commissioners Precinct No. 2?

A. Yes, sir.

Q. Now, you testified at some length this morning about the location of the library and courthouse, some county contributions to a memorial hospital, and that all of these things are located in the city of Midland. Is that correct?

A. The county maintenance depot is out in the county.

[fol. 571] Q. But all these other things—

A. The rest of them are in the city limits of Midland.

Q. Well, this is the only city or town or village in the—the only incorporated city, town or village in the county, isn't it?

A. Yes, sir.

Q. And I think it is all agreed here that the vast majority of the people live—the county's population—live in the city of Midland. You agree to that?

A. I think the majority of them do.

Q. Well, it is more than just a majority. You know that, don't you?

A. Well, when you say "majority," that means more people live here than they do outside.

Q. Well, probably 95 percent. You know that, don't you? The census reflects that?

A. Well, I have read and heard on TV and what-have-you that is somewhere around those figures.

Q. Well, my point is, this is the trading center for people in the county, isn't it? They come to Midland to shop.

A. Partly it is, yes, sir.

Q. It wouldn't be very logical to put these libraries and courthouses anywhere else in the county except in the city of Midland, would it?

[fol. 572] A. Well, in the city or just adjacent probably would be the most sensible place to put them.

Q. All your major arteries, roads, and so forth, lead to the city of Midland, too, of course, in the county, do they not?

A. Around Midland they do. Now west, south and east leads to other cities, Stanton, Garden City, Rankin, Odessa. They are the closest. Now—

Q. Those are in other counties, though.

A. No, the roads—

Q. I mean—

A. —in Midland County lead to Stanton, Garden City, Rankin and Odessa.

Q. But my question was those other cities are located in counties other than Midland.

A. Yes, sir.

Q. Now you also testified, I believe, that all elected officials of Midland County, other than the county commissioners of Precincts 2, 3 and 4, lived inside the city of Midland.

A. Yes, sir.

Q. And outside of Commissioner Gideon, who is county commissioner for Precinct 1, those officials are elected county-wide, aren't they?

[fol. 573] A. Yes, sir, they are.

Q. And they can live any place they want to. They live here as a matter of choice, don't they?

A. Yes, sir. That is their privilege of being American citizens.

Q. They can move to any corner of the county if they want to.

A. Yes, sir.

Q. And I believe you testified that a large percentage of the county employees live in Commissioners Precinct 1 and specifically within the city of Midland, did you not?

A. Most of them live within the city limits of Midland.

Q. You don't have any residential requirements for your employees, do you, the county employees?

A. No, sir. Probably the requirement that they do live in Midland County.

Q. Right, but anywhere in Midland County.

A. Yes, sir.

Q. They live in the city of Midland as a matter of choice.

A. The ones who live here do, I am sure.

Q. If they want to move outside any place in the county, well, it is not going to jeopardize their job.

A. Sure not, as long as they are in Midland County.

Q. I believe Mr. Pannill, defendants' counsel, asked you [fol. 574] to look at one of the defendants' exhibits, which was an audit for 1961, I believe. Do you know where the audit for 1962 is and the audit for 1963?

A. Yes, sir.

Q. Would that be in the county auditor's office?

A. Yes, sir.

Q. Thank you. Regarding the right-of-way for U. S. Highway 80 running through the city of Midland, I believe you said you purchased some right-of-way. Is that correct?

A. For what we called it at that time, it was known as the bus and truck by-pass route for Midland, and—

Q. And the county—

Mr. Browder: Wait just a minute. Let him finish his answer. Now they did that the other day and now they are doing it again.

The Court: Let him finish, Mr. Olson.

Mr. Browder: Now, your Honor, I do make the same objection.

The Court: Sustained.

Mr. Browder: Thank you, sir.

Q. Excuse me, Mr. Bryant. Go ahead.

The Witness (to the Court): Can I answer the question, Judge?

The Court: Yes.

[fol. 575] A. Midland County did purchase the right-of-way to widen Highway 80 plumb through Midland, and that means now the only existing right-of-way—we did buy right-of-way to widen it plumb through the county. That means plumb through the city limits. Then we did purchase the right-of-way and paid for it for what we call

the bus and truck by-pass through the city limits of Midland.

Q. All right. Now my question, Mr. Bryant, the thing I was really getting to: was it your testimony this morning that you used bond funds for this purpose?

A. Yes, sir.

Q. Now I believe it was earlier testimony in this trial that the county did not have any part of its county road system, maintain any roads, or anything, inside the city limits of the city of Midland. Is that correct?

A. That's correct. We don't maintain any.

Q. And all of your Road and Bridge Fund is used for building and repairing and widening and constructing the county road system in and about the county. Is that not true?

A. Yes, sir, that's correct.

Q. And none of those funds are expended within the corporate limits of the city of Midland.

A. No, sir, they're not. Pardon me, now. The bonds that we vote is for specific, as I said, go through the city [fol. 576] limits here of Highway 80. Well, that's road bonds that's voted, and it is spent and paid for in widening this Highway 80 and buying the right-of-way for your by-pass truck route. That come out of road and bridge funds.

Q. I understood you to say that those were bond funds.

A. They are bond funds, but you have to pay for them out of your road and bridge by taxation. Later on we retire these bonds.

Q. Well, I understand that. Roughly, if you don't recall the exact figures, what is the amount of your Road and Bridge Fund on an annual basis?

A. About $360,000.

Q. That is raised largely by taxes on real property, real and personal property, in the county of Midland.

A. Yes, sir.

Q. You get a little from the state, I believe.

A. Yes, sir, we get some money from the state and some return money on our license plates that were sold here in the county, gasoline tax.

Q. That was $360,000?

A. I just said roughly; you asked me roughly; around $360,000.

Q. The point I wanted to establish, that on this right-of-way through the city here, that was purchased with bond [fol. 577] funds voted by the people, all the people, of Midland County.

A. That's correct.

Q. Whereas your county road system is maintained by taxes that are assessed by the commissioners court and collected by the county tax assessor. There is no vote on that. Isn't that right?

A. That's correct. Vote by the commissioners court.

Q. You testified about the various factors you considered prior to the time you passed this Order, Mr. Bryant, back in August of 1963, and you made great emphasis on road maintenance and construction, and so forth. I believe you also testified that you gave some consideration to population, or did you testify in that fashion?

A. I don't really remember whether I did or not, but if I didn't I intended to. I really think I did.

Q. Well, would you consider that a major factor in your consideration, the distribution of population between commissioners precincts?

A. No, sir, I wouldn't consider that as a major in redistricting a county.

Q. Well, obviously, the manner in which the population is distributed, it was a very minor factor in your consideration, was it not?

A. I wouldn't say it was a minor factor. We had lots [fol. 578] and lots of factors and started out and started over and stopped lots of times on this redistricting before we finally voted.

Q. But, obviously, the way the population is distributed, you didn't think it was important at all to have it dis-

tributed more equally among the commissioners precincts. Is that not true?

A. If I understood your question—state your question again.

Q. My question is, as I recall it, Mr. Bryant: you didn't consider it really important to distribute this population kind of equally among the commissioners precincts, did you?

A. Yes, sir, I sure did.

Q. You did?

A. Yes, sir.

Q. Well, how can you explain the fact that you kept all of it in Commissioners Precinct 1?

A. Every elected official by the people holding an elected office in Midland County today, and it has been way back for years, has been elected by the people that live here in the city limits of Midland. In other words, the people all over the county elected live here in this county are elected by numerous, numerous, numerous people representing the people of Midland here in Midland County. The urban and [fol. 579] rural people are represented by three elected officials, and I think, population-wise, considering how many people here elect and how many in the small rural areas elect, I don't think as it is today that it is out of proportion.

Q. I understand all that, Mr. Bryant.

A. I was just stating the facts as I see them.

Q. Sir?

A. I was just stating the facts as I see them about the fairness to population by the people that people of Midland County elect as their elected officials and the people in different areas being fairly represented in different parts by elected officials of Midland County.

Q. Well, I understand that, Mr. Bryant, but that wasn't exactly what I asked, I don't—

A. That's what I took into consideration when I voted redistricting, remembering the population.

Q. You took into account then that people like the District Judge and the sheriff and tax assessor-collector were elected by the county at large, and you thought that was all the representation those people needed. You didn't think it was necessary to have a somewhat equal distribution of the population among the commissioners precincts.

A. I don't ever consider just one factor. I consider the overall picture and the people in the rural areas need [fol. 580] someone to represent them and the people in the city, taking everything as a whole, is fairly represented, and I think as of today the people in the rural are fairly represented.

Q. All right, sir. Now referring you there, Mr. Bryant, to Defendants' Exhibit 4, the map or plat on the right-hand portion which I believe is the same as Plaintiff's Exhibit No. 32; anyway, it is the plan submitted by Mr. Hank Avery. You will acknowledge, will you not, that had that plan been put into effect there would have been a substantially equal distribution of the population of the county among the four commissioners precincts?

A. It would have been pretty well equal as far as the mileage and the population, but you would put all of the representation that Midland County would have all living up here in the city limits. The other areas wouldn't have any representation at all. I'm just looking at that there. I haven't went over it to see that there is anything accurate the way he has drawed it off, but it looks pretty well.

Q. Excuse me, Mr. Bryant..

A. Pardon me, go ahead. I was through.

Q. You would also have a substantial equal distribution of a number of qualified voters of the county, would you not?

A. I couldn't honestly answer your question, because I don't know where the people live. You can drive around [fol. 581] town but you can't tell where most of them do live.

Q. You would also have generally an equal distribution of the tax values of the county among the four commissioners precincts under the Avery plan, would you not?

A. I didn't make a study to see really accurate on that to really answer your question.

Q. Now, Mr. Bryant, assuming for a moment that that plan were in effect, Mr. Avery's plan or suggestion, you would reside in commissioners precinct there as you so now, would you not?

A. Yes, sir.

Q. And there is nothing in the world, no legal reason, why you couldn't run and be elected as commissioner of Precinct No. 2, is there? It would be up to the voters of that district to make that determination, would it not?

A. Well, it has always, yes, sir, up to the voters.

Q. All right, sir. If the people wanted you, they would elect you, wouldn't they?

A. If the majority in that precinct wanted you, they would elect you.

Q. I believe you said this morning that you couldn't recall an occasion on the commissioners court when the county judge or the commissioner of Precinct 1 came up with a plan or a proposal or suggestion where the three [fol. 582] other commissioners opposed or rejected them on what they might want.

A. As I remember, that was partly my statement. I think I intended to add "for the betterment of Midland County."

Q. Also,—

A. I know different instances that we have voted and that was redistricting.

Q. So regardless of what the county judge may have come up with or the commissioner of Precinct No. 1, if the other three of you thought it was for the betterment of Midland County, you went along with it; if you didn't you blocked it.

A. We don't, never have, since I've been commissioner, the three rural commissioners have never got together and

agreed to block anything. If any proposition is offered to us, we vote as we individually see fit.

Q. I understand that, Mr. Bryant, and I certainly didn't mean to imply—

A. We have voted against redistricting, if that is your question, yes, sir.

Q. I want to get to a couple of questions on that. Isn't it true that back in the fall of 1962 that Commissioner Gideon made a motion that the county be divided into commissioners precincts according to substantial numerical equality?

A. Mr. Gideon did make motions at different times to redistrict Midland County, but until we had our hearings I [fol. 583] have never known of him coming up with a specific plan.

Q. Do you recall that motion I refer to?

A. Yes, sir. He has.

Mr. Pannill: Your Honor, I am going to interpose an objection here about the Best Evidence Rule or that they produce the minutes, because, if they are thinking about the one I am thinking about, they are not stating it according to the minutes. I would appreciate it if we could get the minutes of that meeting.

Mr. Olson: He answered the question, your Honor.

The Court: What was the question again? I missed it.

Mr. Olson: Your Honor, as I recall the question, it was whether Mr. Bryant recalled Commissioner Gideon making a motion back in the fall of 1962 that the county be divided into commissioners precincts according to substantial numerical equality.

The Court: Do you object to the question?

Mr. Pannill: I object to the question on the ground that the minutes of that meeting are the best evidence of what took place, and that they are official records and this witness can not go behind it.

The Court: Sustain the objection.

Q. I believe you did answer that you did recall such a [fol. 584] motion, Mr. Bryant.

A. Mr. Gideon made a motion that we redistrict Midland County, but he didn't have a map, he didn't have specific plans, of just how he would redistrict it. He made a motion, as I remember it, to redistrict.

Q. According to substantial numerical equality.

A. The way I remember it, he did not put that in there. He made the motion to redistrict Midland County, and I have never known of him coming up with any specific plan or recommendation, until we had our hearings, on how to do it according to anything.

Q. You testified this morning that Judge Noel Cason, who was county judge before Judge Culver, often advocated the redistricting plan whereby the city would be divided between two commissioners precincts.

A. Yes, sir.

Q. I believe you also testified that you were always opposed to that.

A. I don't know whether I testified I was against that plan or not. I don't remember it.

Q. Well,—

A. I did say it was never brought to a vote of the commissioners court while Judge Cason was in office to vote on his plan on this two and two route. I never did vote for it; [fol. 585] I never did vote against it while he was in office. It never came up for a vote.

Q. Well, later, Mr. Gideon—it is in the record here as an exhibit. I have forgotten the number, but he did submit a plan back in August of 1963 substantially the same for a division of the county whereby the city would be divided between two commissioners precincts.

A. Yes, sir, he did.

Q. You were opposed to that plan?

A. Well, he made the motion and it died for the lack of a second. I didn't vote for it or I didn't vote against it.

Mr. Olson: No further questions.

* * * * * * *

[fol. 601] Recross examination.

By Mr. Olson:

Q. Mr. Bryant, I wonder if I can see those things you were looking at there on value.

A. I beg you could. Which one do you want first?

Q. It doesn't matter. I would like to see both of them, if I may.

[fol. 602] A. There's your square miles and that's your roads. (Handing documents to counsel.) That's just a rough, pencilled notation.

Q. Before we get into that, Mr. Bryant, let me get back just a minute on this right-of-way inside the city and the Big Spring Street underpass, I believe you called it, and so forth, and you said your annual interest in sinking fund requirements were paid out of the Road and Bridge Fund of the county. Is that correct?

A. Yes, sir, I believe that's correct.

Q. Could you tell me the current annual principal and interest fund requirements for that bond issue?

A. There are several different bond issues and I can't say just offhand. I can go to the auditor's office and get it for you, but I just couldn't tell you.

Q. Do you have any idea in just general round figures, like ten thousand dollars a year or twenty, or what?

A. I couldn't give you anything that would be close to correct just on those different bond issues.

Q. I wonder if during the next recess you would mind getting that record for us.

A. If you will write on a piece of paper just what you want, well, I think I could get them for you.

Q. What I want, and I'll just tell you now, is your annual [fol. 603] interest and sinking fund requirements to retire the bond proceeds that were expended on the right-of-way acquisition for U. S. Highway 80, and the construction of this Big Spring Street or road or highway underpass.

A. If you would write your request, I would give it to the auditor and I am sure she would get it for you.

Q. Well, just suppose you bring us the audits for those years. Would you do that?

Mr. Pannill: May we approach the bench?

The Court: Yes.

(Counsel go to the bench and confer with the Court and then take their respective seats.)

Q. All right, Mr. Bryant,—

A. Could I ask you a question?

Q. Sir?

A. Could I ask you a question, Judge?

The Court (to witness): Not now you can't. You can later.

Q. Now I don't mean to belabor this point and, if I am, you say so and I'll get off of it, but what I am interested in, Mr. Bryant, is percentages or in dollars. You have testified that your annual Road and Bridge Fund budget is about $360,000, I believe, and I just wondered if you [fol. 604] could tell me would it be 5 percent or 10 or 15, something of a general nature, as to what portion of that $360,000 is used for retiring these bond funds that were used for this right-of-way and underpass.

A. I couldn't give you the exact, but the county auditor would be glad to bring it to you and read it; in other words, give it to you, I am sure.

Q. All right, sir.

A. That was the question I wanted to ask you, just let her bring it.

Q. You did testify that you had an audit for 1962 and 1963, did you not?

A. Yes, sir, we have an audit each year.

Q. Do they provide the members of the commissioners court with a copy of that audit?

A. Yes, sir.

Q. Do you have a copy?

A. I do at home.

Q. Now you stated in response to counsel's question a minute ago that you felt like you must have rural representation on the commissioners court. Is that correct?

A. That's correct.

Q. Do you feel like you must have, that a majority of the commissioners court must be composed of rural repre-
[fol. 605] sentation?

A. Yes, sir, I do.

Q. And you feel that the only way you can get that majority representation of rural interest on the commissioners court is to divide the county into commissioners precincts, placing the vast majority of the people and qualified voters into one commissioners precinct segregated from the others. Is that correct?

A. Yes, sir, that's correct.

Q. Do you have a constable in your precinct?

A. No, sir.

Q. Do you have a justice of the peace?

A. No, sir, I don't.

Q. You testified as to your memory, you having recalled a matter you forgot to testify about this morning, on what you considered before you voted for the adoption of this order of August 31, 1963, and you said that one thing you took into consideration was the value of personal property in Commissioners Precincts 1, 2, 3 and 4, that this information was prepared by you, prepared for you, by Pritchard & Abbott.

A. I don't remember saying that this morning, sir.

Q. I thought a minute ago that you said these figures you got from Pritchard & Abbott.

[fol. 606] A. I didn't say that I got them from Pritchard & Abbott. Actually, Louis Osborne got them from Pritchard & Abbott and I got them from Louis Osborne. I did weigh those figures when I voted to redistrict Midland County.

Q. When did Mr. Osborne get these figures from Pritchard & Abbott?

A. I don't really know.

Q. When did you get them from Mr. Osborne?

A. I got that particular sheet of paper from him there and—

Q. But you had this information—

Mr. Pannill: Let him answer the question.

Mr. Olson: I am sorry.

A. I got that particular sheet of paper there from him yesterday, but I had saw figures on valuations before.

Q. All right, sir. You considered these figures in your consideration of the adoption of this order of the commissioners court. Did you also obtain and consider figures of value on real property in the various commissioners precincts?

A. I have checked those as I saw them from time to time and I took that into consideration along with this with all those other things when I did vote.

Q. Did you get those figures from Mr. Dean, who testi- [fol. 607] fied here yesterday?

A. Now I have saw figures on different occasions in Mr. Speed's office and some on tax equalization day when—or before tax equalization day we would call him and ask him what it looked like our values would be next year.

Q. It is your testimony that you also obtained and considered figures of the value of real property in these four commissioners precincts.

A. I considered all types of property along with the other things that I considered when we voted.

Q. All right, do you remember approximately what those figures were, the value of real property in the four commissioners precincts?

A. No, sir, I don't know anywhere close to it what they were.

Q. Do you have that information?

A. No, sir, I don't at this time.

Q. Do you suppose you could get it during a recess and bring it back so we can get that in the record, too, along with this?

A. I don't much believe I could during recess. In other words, I don't know whether I care about getting you the information you are wanting like that or not.

Q. You—

[fol. 608] A. If I had had a day or two, well, I wouldn't have minded working it up for you or anyone else, but on a recess I just don't think I could do it.

Q. You mean you just rather not have those figures in the record of this trial.

A. If we had a day or two, I would be glad to get them for anybody. In other words, the Judge, if he wanted any record, I would be more than happy to obtain them for him and be happy for him to check them in any way he sees fit. I have nothing to hide, whatsoever, but as far as recess, I'm a little bit tired and about half confused and I just couldn't get them for you during recess.

The Court: You want a recess now, Mr. Bryant?

The Witness: No, sir, go right ahead. I want to get this over with.

Q. All right, Mr. Bryant, you do know, of course, the large percentage of those real estate values are located in Commissioners Precinct No. 1.

A. Real estate, I do, yes, sir.

Q. Now you said that before you voted on this order and as you considered it, dividing the county into commissioners precincts back in August of 1963, that you figured up the miles of road and the total land area, and you took into account these figures on personal property values in the [fol. 609] commissioners precincts. Did you get together any figures on population?

A. We didn't get together any figures. We knew that they come and go and move here and move there and change from time to time. We didn't get any accurate population figures together, no, sir.

Q. Did you get together any figures on qualified voters by precincts?

A. We assumed that the reports that we read in our paper was somewhere correct of the people that paid a poll tax. That don't mean the people; that means the ones who paid their poll taxes would be eligible to vote.

Q. But you didn't get together any figures on population nor qualified voters?

A. No, sir, we thought that we could go by the records, and we were thinking about that when we redistricted it. In other words, closer than that. We didn't get the exact number.

Q. Mr. Bryant, I am going to hand you these things back here now that I got from you, and I have one or two questions I would like to ask you regarding the miles of road by precincts that you testified to. It may have been that I misunderstood you, but would you call out again—well, let me just ask you this: I understood you to say [fol. 610] that there were 140 miles of road in Commissioners Precinct No. 2. Now the information we have and that Mr. Schumann testified to was 114 miles of road.

A. You misunderstood me because it is wrote right here, —68 miles, 1; 114, 2; 84 in 3; Precinct 4, 79 miles.

Q. All right, thank you. That conforms with what I had, and I did misunderstand you.

Mr. Olson: I don't believe we have any further questions.

Mr. Pannill: That is all, Mr. Bryant.

* * * * * * *

[fol. 345]

IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS

142ND JUDICIAL DISTRICT

No. 18,018

HANK AVERY, Plaintiff,

v.

EDWARD N. GIDEON, et al., Defendants.

JUDGMENT—Entered September 11, 1964 and filed September 14, 1964

On the 18th day of May, 1964, came on to be heard the above numbered and entitled cause, wherein Hank Avery is Plaintiff and the Commissioners' Court of Midland County, Texas, comprised of Edward N. Gideon, Commissioner of Precinct No. 1, Alvey A. Bryant, Commissioner of Precinct No. 2, Clark Moreland, Commissioner of Precinct No. 3, Louis Osborne, Commissioner of Precinct No. 4, and Barbara G. Culver, County Judge, and Midland County, Texas, are Defendants, and came the parties in person and by their respective attorneys and announced ready for trial. All matters of fact and of law were submitted to the Court without the intervention of a jury, and the pleadings, the evidence, and argument of counsel were heard by the Court.

It appears to the Court and the Court finds that on the 31st day of August, 1963, the Defendants Gideon, Bryant, Moreland, and Osborne, constituting and acting as members of the Commissioners' Court of Midland County, Texas, passed and approved an Order of said Commissioners' Court dividing and redistricting said County into four new Commissioners' Precincts, designated as Commissioners' Precincts Nos. 1, 2, 3, and 4, the boundaries of said new Commissioners' Precincts to become effective on the 1st day of January, 1964. Further, that on the date of such

Order and at all other relevant times, Midland County, Texas, had a population of approximately seventy thousand (70,000) persons and that in excess of ninety-five per cent (95%) of such population resided in said new Commissioners' Precinct No. 1 and that the remaining popula-
[fol. 346] tion of said County was distributed among said new Commissioners' Precincts Nos. 2, 3, and 4. The Court further finds that on the date of such Order and at all other relevant times in excess of ninety-seven per cent (97%) of the qualified voters of said County shown on the certified lists of qualified voters prepared and maintained by the County Tax Assessor-Collector resided in said new Commissioners' Precinct No. 1 and the remaining qualified voters of said County shown on said lists of qualified voters were distributed among said new Commissioners' Precincts Nos. 2, 3, and 4. Further, that on the date of such Order and at all other relevant times other pertinent factors, such as land area and taxable values of said County, were grossly disproportionate among such new Commissioners' Precincts of said County. The Court further finds that at all times relevant to the matters in controversy these facts were well known to the Defendants.

The Court further finds that the division effected by the Order of August 31, 1963, made only insignificant changes in the Commissioners' Precincts as they existed prior to such Order and that substantially the same conditions and disparities, particularly as to the distribution of population and qualified voters, would have existed on such date and at such other relevant times under all prior divisions of said County into Commissioners' Precincts.

The Court further finds that on the date of such Order and at all other relevant times the County of Midland could have been divided into Commissioners' Precincts on a basis or plan taking into proper account population, number of qualified voters, land area, taxable values, and other pertinent factors, which would have been and which would be practical and for the convenience of the people.

The Court further finds that in passing and approving the Order of August 31, 1963, the Defendants, Gideon, [fol. 347] Bryant, Moreland, and Osborne did not give due and proper consideration to the aforementioned factors or to any other factors which should have been considered in effecting a division of said County into Commissioners' Precincts. Further, that there was no evidence on the date of such Order or at any other relevant time justifying or supporting the division made by said Order. Further, that the principal purposes of the Defendants Gideon, Bryant, Moreland, and Osborne, or a majority thereof, in passing and approving the Order of August 31, 1963, were for political expediency, to maintain the status quo, and to insure that the rural areas of Midland County, Texas, would continue to elect a majority of the members of the Commissioners' Court of said County.

The Court further finds that in passing and approving the Order of August 31, 1963, the Defendants Gideon, Bryant, Moreland, and Osborne, constituting a majority of the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly, and wrongfully, and in gross abuse of their discretion, and that such action constituted invidious discrimination. Further, that the division of said County into new Commissioners' Precincts by the Order of August 31, 1963, was not for the convenience of the people of Midland County, Texas, as required by Article 5, Section 18 of the Constitution of the State of Texas.

It Is, Therefore, Ordered, Adjudged and Decreed by the Court that the Order of the Commissioners' Court of Midland County, Texas, passed and approved on the 31st day of August, 1963, dividing and redistricting said County into new Commissioners' Precincts, and all prior orders of the Commissioners' Court of said County dividing the same into Commissioners' Precincts, be and they are hereby, in all things, set aside.

It Is Further Ordered, Adjudged and Decreed by the [fol. 348] Court that not later than the next succeeding July or August term of the Commissioners' Court of Midland County, Texas, that said Commissioners' Court, comprised of the Defendants Gideon, Bryant, Moreland, Osborne, and Culver, divide said County into four Commissioners' Precincts for the convenience of the people of said County and in so doing to establish such Commissioners' Precincts so that each will have substantially the same number of people.

It Is Further Ordered, Adjudged, and Decreed by the Court that all costs herein be assessed against the Defendants.

It Is Further Ordered, Adjudged, and Decreed by the Court that all other relief prayed for by all parties is denied.

To all of which action the Defendants Bryant, Moreland and Osborne duly excepted and gave notice of appeal to the Court of Civil Appeals for the 8th Supreme Judicial District of Texas at El Paso, Texas.

Entered this the 11th day of September, 1964.

JOE DIBRELL, Judge Presiding.

[fol. 349] [File endorsement omitted.]

[fol. 350]

IN THE COURT OF CIVIL APPEALS

EL PASO

No. 5745

Appeal from the District Court of
Midland County

MIDLAND COUNTY, TEXAS, et al., Appellants,

—VS—

HANK AVERY, Appellee.

OPINION—December 8, 1965

This is a county commissioners' precinct redistricting case, appealed from the judgment of the District Court of Midland County, Texas. Avery, appellee here, brought the suit as a resident property owner, tax payer and qualified voter of the City of Midland, County Commissioners' Precinct No. 1, Midland County, Texas, "individually and on behalf of other persons similarly situated and qualified" against the County of Midland and its county judge and four county commissioners, appellants here. Plaintiff-appellee's pleadings reflect that, since the time of its incorporation in 1901, the City of Midland, lying virtually in its entirety in Commissioners' Precinct No. 1, has been the only incorporated city, town or village in Midland County. The city's population had grown through the years until at the time of the 1960 Federal Decennial Census its population represented 92.48 per cent of the population of the county, and Precinct No. 1 contained 97.80 per cent of the population of the county. Of the qualified voters of the county in that year, 97.88 per cent resided in Precinct No. 1. Plaintiff asserted that other things, such as market value and assessed value of taxable property, miles of county roads, land area, allocation and use of county

funds and revenue, etc., were disproportionately distributed among the commissioners' precincts of the county, making the precincts as established "grossly impractical and inconvenient to the people". In September, 1962, plaintiff petitioned the Commissioners' Court for a redistricting of the county's precincts, but "such petition and request [fol. 351] was refused". In that same month this suit was filed to compel a redistricting, invoking the jurisdiction of the district court under its supervisory control of county commissioners' courts as provided in Article V, § 8 of the Texas Constitution. During the pendency of this suit, and in July and August, 1963, public hearings were held by the Commissioners' Court on the matter of redistricting the county, during which time plaintiff and others testified or presented plans for such redistricting. On August 31, 1963, plaintiff's pleadings relate, the Commissioners' Court adopted an order, effective January 1, 1964, redistricting Midland County into commissioners' precincts, which order, plaintiff alleges, made only insignificant changes in the boundaries of commissioners' precincts and in no way corrected or lessened the great disparity in population, qualified voters, land area, assessed value of taxable property, miles of county roads and other pertinent things among the commissioners' precincts of said county; that in passing said order the commissioners had acted arbitrarily and capriciously, in abuse of their discretion and without regard to the convenience of the people of Midland County or the rights, privileges and guarantees of plaintiff and others similarly situated by the Constitution of the State of Texas and of the United States. Plaintiff prayed that such order of the Commissioners' Court of August 31, 1963 and all prior orders dividing Midland County into commissioners' precincts be set aside and that writ of mandamus issue compelling the defendants to pass a new order giving proper consideration to equality of population and the other factors said by plaintiff to be pertinent in the division of the county into commissioners' precincts.

The presiding judge, who heard the cause without the intervention of a jury, found that Precinct No. 1 had in excess of 95 per cent of the total population of the county [fol. 352] under the order of August 31, 1963, and that on the date of such order over 97 per cent of the qualified voters of the county resided in said Precinct No. 1, and that there was a gross disparity of other pertinent factors, such as land area and taxable values in said order as in all previous orders dividing said county into commissioners' precincts; that in passing such order of August 31st the defendants had acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully, in gross abuse of their discretion, and that their action constituted invidious discrimination. The court's judgment further found that the said order was not for the convenience of the people of said county as required by Article V, § 18 of the Constitution of the State of Texas. The judgment of the court set aside said order and all previous orders dividing the county into commissioners' precincts, and ordered that the Commissioners' Court, not later than the next succeeding July or August term of said court, "divide said County into four Commissioners' Precincts for the convenience of the people of said County and in so doing to establish such Commissioners' Precincts so that each *will have substantially the same number of people*". (Emphasis supplied).

Appellant Commissioners advanced twelve points of error and appellant Midland County presented two points of error attacking the District Court's order as above set out. We deem it unnecessary to discuss these points separately or at length, but will treat only those assignments which relate to that part of the order underscored above which embodies the mandatory requirement that the county be divided into precincts so that each would have substantially the same number of people. We are in accord with the assertion by appellant Commissioners that "neither the Constitution of the United States nor the Constitution of Texas, as construed and interpreted by the courts, contains any requirement that county commissioners precincts be equal to each other in population . . ."

Article IV, § 4 of the United States Constitution merely [fol. 353] provides that "The United States shall guarantee to every State in this Union a Republican Form of Government . . .". Amendment XIV, section 1 provides: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article V, § 8 of the Texas Constitution provides that the district courts "shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law; . . ."; and § 18 of the same Article relates to commissioners' precincts:

> "Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight . . . Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner . . . The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed . . ."

Among the scant authority in Texas on the subject of establishment of commissioners' precincts is to be found the 1932 opinion of this court in Lewis v. Harris, 48 S.W.2d 730, in which a writ of error was refused. This was a redistricting case which arose in Upton County, and we find the facts involved and the language employed so nearly applicable to the case before us as to justify quotation therefrom at some length. The court states:

". . . Appellants cite section 18, art. 5, of the State Constitution which, in substance, requires the division of the county 'from time to time, for the convenience of the people, into precincts,' and that the commissioners' precincts shall be four in number.

"Disregarding legal conclusions stated therein, the petition here simply shows a state of facts which gives [fol. 354] to the town of Rankin and precincts Nos. 1, 2, and 3 a power of control over the commissioners' court of the county out of proportion to their population, voting strength, and taxable values, thereby denying to the town of McCamey and precinct No. 4 the representation upon the court and power of control to which such town and precinct is justly entitled by the population, voting strength, and taxable values thereof.

"As applied to different situations, the phrase 'convenience of the people,' as used in the Constitution, may have different meanings, but in our opinion it cannot properly be construed as imposing upon a commissioners' court the absolute duty of rearranging the boundaries of commissioners' precincts, from time to time, so as to accord to each precinct representation upon and power of control of the commissioners' court in proportion to their respective populations, voting strengths, and taxable valuations. This is what the present action seeks to compel. The location of cities and towns in certain counties is no doubt such that it cannot be conveniently done. From a political viewpoint it is desirable and just that the precincts should be so arranged, but in some instances it is doubtless not practical.

"It is not alleged that a redivision of the county as sought is practical and convenient for the people. Plaintiffs simply base their demand upon population, voting strength, and taxable valuation. The present division is inconvenient in the sense only that the town of McCamey and precinct No. 4 have not the

representation upon and control of the commissioners' court to which the plaintiffs say such town and precinct are justly entitled by the population, voting strength, and taxable valuation thereof.

"There is no law imposing upon a commissioners' court the duty of rearranging the commissioners' precincts of a county upon such a basis, and the writ of mandamus will not lie to compel such action. The demurrers were properly sustained."

The cited case is given recognition in Hatter v. Worst, 390 S.W.2d 293 (Tex. Civ. App., 1965; n.r.e.), although Lewis v. Harris was not controlling on the issue involved in the latter case. An analytical and well-documented discussion of the case now before us is to be found in the Winter, 1965 issue of the Baylor Law Review, Vol. XVII, No. 1, p. 41, written by J. William Davis, which it would be well for the reader of this opinion to review for additional background information on the case before us.

We have come to the conclusion that the judgment of the lower court in the instant case must be reversed. It [fol. 355] has been stated here that this judgment orders the Commissioners' Court of Midland County to divide said county into four Commissioners' Precincts "for the convenience of the people of said County" and in so doing to establish such commissioners' precincts "so that each will have substantially the same number of people". The order thus exceeds the admonition contained in the Texas Constitution that requires only that the division of the county in such precincts be "for the convenience of the people", which, as stated in Lewis v. Harris, supra, cannot properly be construed as imposing upon a commissioners' court the absolute duty of rearranging the boundaries of commissioners' precincts so as to accord to each precinct representation upon and power of control of the commissioners' court in proportion to their respective populations, voting strengths and taxable valuations, however desirable, in certain instances, such a division might be. Just as

there is no law or constitutional requirement that such a division be made, neither is there authority, in our opinion, for the lower court herein to compel the establishment of commissioners' precincts so that each will have substantially the same number of people. Following this reasoning, the lower court was without authority to enter the order embodied in its judgment, and such judgment must therefore be reversed.

Since this case has been thoroughly tried and expertly briefed by both parties, we feel that no useful purpose would be served by a remand, and this cause is therefore here rendered for the appellants.

Reversed and rendered.

William E. Clayton, Associate Justice.

[fol. 356] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 357]

IN THE SUPREME COURT OF TEXAS

From Midland County, Eighth District.

No. A-11272

HANK AVERY, Petitioner,

v.

MIDLAND COUNTY, TEXAS, et al., Respondents.

OPINION—July 13, 1966

Article V, Section 18, of the Texas Constitution requires a division of the counties of Texas "from time to time, for the convenience of the people . . . into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one county commissioner . . ." This case presents for decision the question of the constitutional validity of such division in Midland County, Texas. The county was last redistricted by order of its commissioners court dated August 31, 1963, effective January 1, 1964. This suit by Petitioner, a resident property owner, taxpayer and qualified voter of Precinct No. 1, Midland County, attacks the division and seeks a redistricting. The judgment of the trial court set aside the current and previous orders dividing Midland County into commissioners precincts and ordered a redistricting of the county on the basis of equality of population in the precincts. The Court of Civil Appeals reversed the judgment of the trial court and rendered a take-nothing judgment against Petitioner. 397 S.W.2d 919. We reverse the judgments below and remand the case to the trial court for further proceedings.

The findings of the trial court in its judgment, and the decretal portions thereof, will be helpful to an understanding of our holding and disposition of the cause. We quote from the findings of the trial court:

[fol. 358] "... Further, that on the date [August 31, 1963] of such Order and at all other relevant times, Midland County, Texas, had a population of approximately seventy thousand (70,000) persons and that in excess of ninety-five per cent (95%) of such population resided in said new Commissioners' Precinct No. 1 and that the remaining population of said County was distributed among said new Commissioners' Precincts Nos. 2, 3, and 4. The court further finds that on the date of such Order and at all other relevant times in excess of ninety-seven per cent (97%) of the qualified voters of said County shown on the certified lists of qualified voters ... resided in said new Commissioners' Precinct No. 1 and the remaining qualified voters of said County shown on said lists of qualified voters were distributed among said new Commissioners' Precincts Nos. 2, 3, and 4. Further, that on the date of such Order and at all other relevant times other pertinent factors, such as land area and taxable values of said County, were grossly disproportionate among such new Commissioners' Precincts of said County....

"The Court further finds that on the date of such Order and at all other relevant times the County of Midland could have been divided into Commissioners' Precincts on a basis or plan taking into proper account population, number of qualified voters, land area, taxable values, and other pertinent factors, which would have been and which would be practical and for the convenience of the people.

"The Court further finds that in passing and approving the Order of August 31, 1963, the Defendants ... did not give due and proper consideration to the aforementioned factors or to any other factors which should have been considered in effecting any division of said County into Commissioners' Precincts. Further, that there was no evidence on the date of such Order or at any other relevant time justifying or supporting the division made by said Order. Further, that the prin-

cipal purposes of Defendants . . . in passing and approving the Order of August 31, 1963, were for political expediency, to maintain the status quo, and to insure that the rural areas of Midland County, Texas, would continue to elect the majority of the members of the Commissioners' Court of said County.

[fol. 359] "The Court further finds that in passing and approving the Order of August 31, 1963, the Defendants . . . acted arbitrarily, capriciously, unreasonably, unfairly, and wrongfully, and in gross abuse of their discretion, and that such action constituted invidious discrimination. Further, that the division of said County . . . was not for the convenience of the people of Midland County . . . ."

The decretal portions of the judgment, however, were as follows:

"IT IS, THEREFORE, ADJUDGED AND DECREED by the Court that the order of the Commissioners' Court of Midland County, Texas, passed and approved on the 31st day of August, 1963, dividing and redistricting said County into new Commissioners' Precincts, and all prior orders of the Commissioners' Court of said County dividing the same into Commissioners' Precincts, be and they are hereby, in all things, set aside.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that not later than the next succeeding July or August term of the Commissioners' Court of Midland County, Texas, that said Commissioners' Court . . . divide said County into four Commissioners' Precincts for the convenience of the people of said County *and in so doing* to establish such Commissioners' Precincts *so that each will have substantially the same number of people.*" (Italics added)

Petitioner attacks the current and prior orders of the commissioners court dividing Midland County into commisioners precincts as invalid under Article V, Section 18,

Article I, Section 3, and Article I, Section 19, of the Texas Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution, because of the gross population disparity. He argues that these constitutional provisions require equality of population in the precincts. Respondents assert, on the other hand, that Petitioner did not state or show a cause of action, [fol. 360] or establish a justiciable interest or right to bring this suit as representative of a class, because equality of population in the precincts is not required but only that the precinct division be for the convenience of the people in the terms of Article V, Section 18, of the Texas Constitution.

Petitioner as a voter in the county has a justiciable interest in matters affecting the equality of his voting and political rights. Cf. *Baker* v. *Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.ed.2d 663 (1962); *Stovall* v. *Shivers*, 129 Tex. 256, 103 S.W.2d 363 (1937); *Dubose* v. *Woods*, 162 S.W. 3 (Tex.Civ. App. 1913, no writ hist.). We agree with the holding of the trial court that the current order of the commissioners court redistricting Midland County is not supportable under the requirements of the Texas and the United States Constitutions for the reasons stated by the trial court in its judgment findings. We are not in agreement, however, with the judgment of the trial court to the extent that it orders a redistricting of the county on the sole basis of equality of population.

Article V, Section 18, of the Texas Constitution provides:

> "Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts . . . Divisions shall be made by the Commissioners Court provided for by this Constitution. . . . Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the [fol. 361] qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County

> Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed."

Article I, Section 3, reads as follows:

> "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."

The county is a subordinate and derivative branch of state government. Its governmental body is the commissioners court composed of the four county commissioners with the county judge as the presiding officer. See Articles 2351 et seq., Vernon's Ann. Civ. Stats., for an enumeration of the statutory powers and duties of the commissioners court. The appellation "court" is a misnomer in the accepted meaning of the designation. See 11 Tex.L.Rev. 518 (1933). The commissioners are elected by the qualified voters of the precincts; the county judge is elected by the qualified voters of the entire county. The primary function of the commissioners court is the administration of the business affairs of the county. See *Ehlinger* v. *Clark*, 117 Tex. 547, 8 S.W.2d 666 (1928). Its legislative functions are negligible and county government is not other- [fol. 362] wise comparable to the legislature of a state or to the federal Congress where the "one man, one vote" principle is asserted in its most exacting and compelling sense. See *Reynolds* v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.ed.2d 506 (1964);[1] *Westberry* v. *Sanders*, 376 U.S. 1,

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[1] "Political subdivisions of States—counties, cities, or whatever —never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in Hunter v. City of Pittsburgh, 207 U.S. 161, 178, 52 L.ed.

84 S.Ct. 526, 11 L.ed.2d 481 (1964); *Gray* v. *Sanders*, 372 U.S. 368, 83 S.Ct. 801, 9 L.ed.2d 821 (1963); *Baker* v. *Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.ed.2d 663 (1962).

This Court has not written upon the specific duty of the commissioners court under Article V, Section 18, to divide the county from time to time into four commissioners precincts for the convenience of the people. There are four cases in which the Courts of Civil Appeals have done so: *Lewis* v. *Harris*, 48 S.W.2d 730 (Tex.Civ.App. 1932, writ ref.); *Ward* v. *Bond*, 10 S.W.2d 590 (Tex.Civ.App. 1928, no writ hist.); *Williams* v. *Woods*, 162 S.W. 1031 (Tex. Civ.App. 1914, no writ hist.); *Dubose* v. *Woods*, 162 S.W. 3 (Tex.Civ.App. 1913, no writ hist.). In *Harris*, 20 per cent of the people of the county elected three of the four commissioners and the taxable values in the one precinct containing 80 per cent of the population substantially exceeded [fol. 363] those of the three other precincts combined. The suit was for a mandamus to compel a redistricting. It was held that such facts did not show that the discretion of the commissioners court had been abused by arbitrary action, the court saying:

> "As applied to different situations, the phrase 'convenience of the people,' as used in the Constitution may have different meanings, but in our opinion it cannot properly be construed as imposing upon a commissioners' court the absolute duty of rearranging the boundaries of commissioners' precincts, from time to time, so as to accord to each precinct representation upon and power of control of the commissioners'

151, 159, 28 S.Ct. 40, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,' and the 'number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State.' The relationship of the States to the Federal Government could hardly be less analogous." Reynolds v. Sims, supra, 377 U.S. at 575.

> court in proportion to their respective populations, voting strengths, and taxable valuations. . . ."

Ward v. *Bond* considered a division order redistricting the county into new commissioners precincts equal in area but unequal in population to the extent that 54.5 per cent of the voters elected one commissioner, with 45.5 per cent electing the other three commissioners. The Court of Civil Appeals affirmed the action of the trial court sustaining the division order. The Court stated that disparity in population was not a sufficiently serious consideration to justify a reversal of the trial court judgment but pointed out that the disparity in population would shortly disappear as the result of the construction of a railroad through the county. The Court also sought to distinguish the *Dubose* and *Williams* cases on the ground that the new division lines in these cases practically deprived some voters of their right of franchise.

[fol. 364] The *Williams* and *Dubose* cases were sequels and county districting orders were held invalid in each case. In *Williams*, Dunn County was divided in such manner that 500 voters would elect two commissioners and 120 voters would elect two commissioners. There was a similar disparity in area. It was recognized by both parties that the precincts had been divided along ethnic lines, the Court saying:

> "The great disparity in acreage and population is sought to be justified only on the ground that the county should be so divided as to give the Anglo-Saxons a part of the precincts and the Mexican population the others. Convenience of the voter did not enter the consideration of the Court, but divisions of the territory were made that would tend to foment strife among citizens of different races."

Dubose, involved a division of Dunn County under which 500 voters elected one commissioner and 140 voters elected the remaining three commissioners, together with similar

disparity in area and public roads. Moreover, the precincts were drawn so as to deprive two towns in the county of polling places where they had been located for the past thirty years. The Court said: "The facts alleged in the sworn petition show conclusively that as to neither class of precincts is the division of the county one which is convenient to the people of said county; and in fact such division is so arbitrary and wrong that the court should not for a moment tolerate the same. . . . When considered as commissioners precincts, it is manifest that wrong was committed in making the districts largely disproportionate [fol. 365] as to acreage and population. . . . The government of the county will be taken away from the majority of the voters. . . ."

The requirements of Article V, Section 18, of the Texas Constitution are to be construed and enforced consistently with Article I, Section 3, commonly referred to as the equal rights or equal protection clause of the Texas Constitution. Cf. *Railroad Commission* v. *Shell Oil Co.*, 139 Tex. 66, 161 S.W.2d 1022 (1942). Equal protection of laws is not secured if persons are deprived of equality in political rights or otherwise subjected to an arbitrary exercise of governmental powers. See *Burroughs* v. *Lyles*, 142 Tex. 704, 181 S.W.2d 570 (1944); *Mumme* v. *Marrs*, 120 Tex. 383, 40 S.W.2d 31 (1931); *Glasgow* v. *Terrell*, 100 Tex. 581, 102 S.W. 98 (1907). This Court considered the terms "convenient" and "convenience of the people" appearing in Article V, Section 18, in *Williams* v. *Castleman*, 112 Tex. 193, 247 S.W. 263 (1922), involving an order of the commissioners court creating an additional justice of the peace precinct. Two principles relevant here were there recognized, namely, that in discharging the requirements of Article V, Section 18, the commissioners court was given some discretion to meet the "changing needs of the people" but such must be "exercised in good faith and without fraud, not arbitrarily, nor in gross abuse of discretion." [fol. 366] The basic problem of Texas counties in the respects under review is the extent of political power which

the metropolitan areas should have in relation to the rural areas. The very fact of population concentration enables the city voters to elect the county-wide officers. We recognized in *Pritchard & Abbott* v. *McKenna*, 162 Tex. 617, 350 S.W.2d 333 (1961), that the county commissioners court is not charged with the management and control of all of the county's business affairs; and that the various officials elected by all the voters of the county have spheres that are delegated to them by law and within which the commissioners court may not interfere or usurp. The voice of the rural areas will be lost for all practical purposes if the commissioners precincts of counties are apportioned solely on a population basis except, perhaps, in those few sparsely settled counties without a concentration of urban centers. Yet, important affairs of the county administered by the commissioners court—such as roads, bridges, taxable values of large land areas—disproportionately concern the rural areas. Theoretically, the commissioners court is the governing body of the county and the commissioners represent all the residents, both urban and rural, of the county. But developments during the years have greatly narrowed the scope of the functions of the commissioners court and limited its major responsibilities to the nonurban areas of the county. It has come to pass that the city government with its legislative, executive and judicial branches, is the major concern of the city dwellers and the administration of the affairs of the county is the major concern of the rural dwellers.

[fol. 367] As we have said, equal rights and equal protection of laws require equality in political rights and there may be circumstances under which equality in population of political subdivisions electing representatives to an overall governing body is essential to equality in voting rights. On the other hand, the convenience of the people in the particular circumstances of a county may require—and constitutionally justify—a rational variance from equality in population in commissioners precincts upon the basis of additional relevant factors such as number of

qualified voters, land areas, geography, miles of county roads and taxable values. The trial court in its judgment found that such considerations could have been taken into account in the precinct division in Midland County, notwithstanding which he ordered a redistricting to achieve substantial equality of population.

We agree with the holding of the trial court that there is obvious arbitrariness in the current districting order here under attack because of the patent malapportionment of the commissioners precincts of Midland County. The judgment findings of the trial court show the absence of any rational basis therefor.

We disagree with the judgment of the trial court in its requirement that Midland County be redistricted into commissioners precincts solely upon the basis of population. For the reasons before stated, we are of the opinion that the equal protection of the law clauses of the Texas and the United States[2] Constitutions do not require a com- [fol. 368] missioners precinct division of Texas counties on this basis in all cases, dependent, of course, in each case upon the existence and effect of other relevant factors such as those we have mentioned. But neither this Court nor the district court has the power to redistrict Midland County into commissioners precincts. This is the responsibility of the commissioners court and is to be accomplished within the constitutional boundaries we have sought to delineate. In no event is a population disparity sustainable against a showing of discrimination, fraud, arbitrariness or abuse of discretion.

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[2] "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." Amend. XIV, § 1, United States Constitution. See *Tedesco* v. *Board of Supervisors*, 43 So.2d 514 (La.App.), appeal denied, 339 U.S. 940, 70 S.Ct. 797, 94 L.ed. 1357 (1960), and the clarification in *Baker* v. *Carr*, 369 U.S. at 233, of the dismissal of the appeal in *Tedesco* for want of a substantial federal question, to wit, there was a rational justification for the population disparity in the districting of city council seats.

The judgments of the Court of Civil Appeals and of the trial court are reversed and the cause is remanded to the trial court for the entry of judgment in accordance with this opinion at a time not to interfere with the 1966 general election process.

Zollie Steakley, Associate Justice.

Associate Justice Hamilton not sitting.
Associate Justice Smith dissenting.

Opinion delivered July 13, 1966.

[fol. 369] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 370]

IN THE SUPREME COURT OF TEXAS

From Midland County—Eighth District

No. A-11272

HANK AVERY, Petitioner,

v.

MIDLAND COUNTY, TEXAS, et al., Respondents.

DISSENTING OPINION—July 13, 1966

I respectfully dissent. I would affirm the judgment of the Court of Civil Appeals. This is not a "one man-one vote" case, nor is there any constitutional requirement for equality in commissioners precincts. Article V, Section 18[1] of the Texas Constitution governs the organization of

[1] "Sec. 18. Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court pro-

commissioners precincts. It is well settled by Texas cases that the phrase "for the convenience of the people" in said Article, confers on commissioners courts the discretion to divide precincts in some physically convenient way, and that there is no requirement for equality of population, and no duty to provide precincts which are equal in population. This is an "abuse of discretion case," the only question before this Court being whether a single private citizen, as here, has a vested right and cause of action to revise and review a commissioners court precinct order to achieve equality in population. The trial court in its judgment, [fol. 371] made several findings of fact, as the Court has indicated, but the decretal portion of the judgment only relates to the finding in regard to population disparity. The judgment directs the commissioners court to use equal distribution of population as the dominant factor in redistricting the County. The judgment rendered by this Court is meaningless. If the Court remands the cause generally for a new trial, citizen Avery has accomplished nothing. On the other hand, if the judgment of the trial court striking down the commissioners court order is upheld, still nothing has been accomplished, except to create additional chaos and confusion. This is true, because Avery, as a single individual and private citizen, has no right or standing in court to question the way the government is

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vided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. As amended Nov. 2, 1954."

run or organized, including the location of commissioners precinct boundaries in Midland County, Texas, unless and until he can show some personal loss, damage or harm to his private interests resulting from the governmental operation. See Meredith v. Sharp, Tex. Civ. App., 256 S.W.2d 870 (1953, writ refused, no reversible error) with Per Curiam opinion, 152 Tex. 437, 259 S.W.2d 172. This case was one wherein mandamus was sought to require a commissioners court to create the office of Justice of the Peace, Place No. 2 of Justice of the Peace, Precinct One of Gregg County, Texas. I think the Court would have made the same holding had the cause been before the appellate courts on appeal.

The Court upheld the judgment of the trial court that Article V, Section 18 of the Texas Constitution "confides in the Commissioners' Court the authority to create a justice of the peace court as here sought; that the convenience of the people is the basic purpose for designating such an additional justice court; *and that the creation of such additional justice of the peace court is a discretionary act of the Commissioners' Court and not a ministerial function of such court.*" [Emphasis added.] The Court then said:

> [fol. 372] "We cannot escape the import of the use of the term 'for the convenience of the people' in Sec. 18, supra; 16 C.J.S., Constitutional Law, §23. The latitude so granted the Commissioners' Court to create not less than four and not more than eight such precincts, and the power to change the boundaries of such precincts from time to time emphasizes the intent to vest discretionary powers in the Commissioners' Court in determining whether or not the creation of such additional court would be for the convenience of the people, that is suitable, appropriate or advisable to meet the needs of the people. This discretionary power on the part of the Commissioners' Court is fully recognized in Williams v. Castleman, 112 Tex.

193, 247 S.W. 263, by our Supreme Court, which involved an affirmative act of the Commissioners' Court in creating such an additional Justice Court, and in the holdings in Lewis v. Harris, Tex. Civ. App., 48 S.W.2d 730, and Ward v. Bond, Tex. Civ. App., 10 S.W.2d 590, 594, which dealt with the discretionary powers of a Commissioners' Court as related to the latter clause of Sec. 18, supra, in altering a Commissioners' Precinct.

"'Mandamus will not lie to control or review the action of an official or board upon matters involving the exercise of discretion or judgment confided to such official or board.' Lewis v. Harris, supra, 48 S.W.2d at page 732; 28 T. J. (Mandamus), Sec. 33."

This holding in regard to discretionary power to create justice courts is equally applicable to this case where the commissioners court has exercised its discretion in changing its boundary lines.

If it can be said that the judgment of the trial court is based upon a finding of abuse of discretion and that Avery has a justiciable interest, I nevertheless maintain that the trial court confined its holding to require a redistricting of Midland County into commissioners precincts upon the basis of population alone.

Avery is in no position to individually attack or set aside the order creating Midland County commissioners precincts because of a disparity in the population of the several precincts in the absence of a showing of some damage, harm, inconvenience, or financial loss to himself personally. This he has failed to do. There being no duty to provide Avery with equally populated commissioners precincts, no legal wrong has been done to him by refusal to divide in that way; there has been no invasion of his [fol. 373] personal rights by including him in a commissioners precinct with a population larger than the other precincts.

Avery attempts to also bring this suit in terms of a class action. In this attempt he completely fails. In his petition he states his capacity as follows:

> "Plaintiff files this petition on behalf of himself and other persons similarly situated in the City of Midland, Precinct No. 1, Midland County, Texas, and states that he is a resident, taxpayer, and legally qualified voter and elector of the City of Midland, Precinct No. 1, Midland County, Texas, and that, as such, he is legally qualified to vote for municipal, precinct and county offices in Midland County, Texas."

The right which he sought was as follows:

> "The Plaintiff has a right and interest to see that *his* civil rights and liberties and in particular *his* right and interest in an equitable apportionment of voting power for members of the Commissioners Court are protected in accordance with the terms of the Texas Constitution and Section 1 of the 14th Amendment to the Constitution of the United States."

The pleadings in this case upon which Avery went to trial are completely void of allegations which would qualify as a class action. The petition fails to comply with any of the provisions of Rule 42,[1] Texas Rules of Civil Pro-

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[1] "(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, in behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

"(1) joint, or common or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

"(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

cedure. Only a quick glance at the rule is required to con- [fol. 374] clude that Avery does not seek to qualify under subdivision (1) of the rule, because the rights which he seeks to enforce are *his* rights and liberties and *his* right to equitable voting power. Such right is not joint or secondary and on its face could not be the proper subject of a class action under subdivision (1) of the rule. Subdivision 2 is out, because there is no specific property involved in this action. Avery's petition fails to qualify him as representing a class, in that it fails to state that there are persons constituting a class. The petition on which he went to trial does not allege that there are other persons having a common interest with Avery in an adjudication of a common question of fact or law. In fact, the record shows that public officials and many others who publicly refused to support Avery, were all citizens of Midland. The evidence and the proceedings fail to show any support of Avery's position from the City of Midland or the residents of the City as a group. The petition does not describe any identifiable class of persons nor state or show that they are so numerous as to make their joinder in the suit impracticable. There is nothing in the petition to show that there are others "similarly situated." The pleadings are lacking and Avery produced no evidence to warrant a valid class judgment. See Schenker v. City of San Antonio, Tex. Civ. App., 369 S.W.2d 626 (wr. ref., n.r.e. 1963).

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

"(b) Dismissal or compromise. A class action shall not be dismissed nor compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it. Amended by order of September 20, 1941, effective December 31, 1941."

Since the subject matter of Avery's complaints in this Court is the disparity of population, and since that subject is a matter of *public* not *private* concern, and since Avery did not properly allege or prove a class action in the trial court, so as to represent the public, the result is that he never reaches or gets to the question of substantial evidence, abuse of discretion, or his asserted claims to *alternative*[5] relief.

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[5] The prayer, reflecting the relief sought, reads as follows:

"Wherefore, premises considered, Plaintiff prays that Defendants be cited to appear herein and that upon final hearing Plaintiff have judgment as follows:

"(a) That the Defendants Gideon, Bryant, Moreland, and Osborne, constituting a majority of the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of their discretion in passing and approving the Order of August 31, 1963, dividing Midland County into Commissioners' Precincts and that said Order, and all prior Orders dividing said county into Commissioners' Precincts, be set aside and that said Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, be directed to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people.

"(b) In the alternative, that the Defendants Gideon, Bryant, Moreland, and Osborne, constituting a majority of the members of said Commissioners' Court, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of their discretion in passing and approving the Order of August 31, 1963, dividing Midland County into Commissioners' Precincts and that said Order, and all prior Orders dividing said County into Commissioners' Precincts, be set aside and that said Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, be directed to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people, giving proper consideration to equality of population, qualified voters, land area, tax values, miles of County roads, and other pertinent things among said Commissioners' Precincts.

"(c) In the alternative, that the Defendants Gideon, Bryant, Moreland and Osborne, constituting a majority of the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly, and wrongfully

[fol. 375] Avery has no standing in this Court to complain of the action of the Court of Civil Appeals on his

and in gross abuse of their discretion in passing said Order and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that writ of mandamus issue compelling the Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing to establish, as nearly as possible and practicable, such Precincts so that each will have substantially the same number of people, qualified voters, square miles, and other pertinent things.

"(d) In the alternative, that the Defendants Gideon, Bryant, Moreland, and Osborne, constituting the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of their discretion in passing said Order and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that writ of mandatory injunction issue restraining and enjoining the Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court from continuing said Order in effect or calling or conducting any election thereunder and directing said Defendants to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing to establish, as nearly as possible and practicable, such Precincts so that each will have substantially the same number of people, qualified voters, square miles, and other pertinent things.

"(e) In the alternative, that the Order of said Defendants on August 31, 1963, dividing Midland County into Commissioners' Precincts was and is repugnant to and in conflict with one or more of the following: The Fourteenth Amendment, Section 1, of the Constitution of the United States of America and Article 1, Sections 1, 2, 3, and 19, of the Constitution of the State of Texas, for the reason that it deprives Plaintiff and others similarly situated of their constitutional rights, privileges, liberties, and guarantees, and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that said Defendants, as members of the Commissioners' Court be directed to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing to establish, as nearly as practicable and possible, such Precincts so that each will have substantially the same number of people and qualified voters."

substantial evidence and alternative relief claims. I would dismiss this cause for want of jurisdiction. In no event does the Constitution of the United States or the Texas [fol. 376] Constitution require that Midland County be divided into four equally populated precincts. The Court's view, if finally adopted, will lead to great confusion and uncertainty not only in Midland County, but in every county in Texas with citizens who have a desire to substitute their judgment for that of the commissioners courts. It seems to me that this is not the proper case in which to extend the doctrine of the one man-one vote rule to the governing bodies of local governments such as commissioners courts. Perhaps, in a proper case, the federal courts will in the future take jurisdiction under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, but I cannot imagine a situation, much less the one presented in this case, where the Texas Constitution or the case law would warrant a holding that there must be equality of population in Commissioners precincts.

Clyde E. Smith, Associate Justice.

Opinion delivered: July 13, 1966.

[fol. 377] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 378]

IN THE SUPREME COURT OF TEXAS

From Midland County—Eighth District

No. A-11,272

HANK AVERY,

vs.

MIDLAND COUNTY, TEXAS, et al.

JUDGMENT—July 13, 1966

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Eighth Supreme Judicial District, and the original transcript and transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court (Associate Justice Smith dissenting) (Associate Justice Hamilton not sitting) that there was error in the judgments of the Courts below, it is, therefore, *adjudged, ordered* and *decreed* that the judgments of the District Court and Court of Civil Appeals be, and hereby are, reversed and set aside, and that this cause be, and hereby is, remanded to the District Court for the entry of judgment in accordance with this opinion at a time not to interfere with the 1966 general election process.

It is further ordered that petitioner, Hank Avery, pay one-half (½) of the costs expended and incurred in this Court and Court of Civil Appeals; that respondents, Midland County, Texas, Alvey A. Bryant, Clark Moreland and Louis Osborne, pay one-half (½) of the costs expended and incurred in this Court and Court of Civil Appeals, and that this decision, with a copy of the opinion, be certified to the District Court of Midland County, Texas, for observance.

[fol. 379] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 380]

IN THE SUPREME COURT OF TEXAS

No. A-11,272

HANK AVERY, Petitioner,

vs.

MIDLAND COUNTY, TEXAS, et al., Respondents.

PETITIONER'S MOTION FOR REHEARING—Filed July 28, 1966

To the Honorable Supreme Court:

Now comes Hank Avery, Petitioner in the above numbered and entitled cause, and respectfully moves the Court to set aside the judgment of this Court rendered on July 13, 1966, and to grant a rehearing and in all things affirm the judgment of the trial court, showing as assignments of error the following:

First Point: The Supreme Court erred in holding that Amendment XIV, Section 1 of the Constitution of the United States does not require that the four County Commissioners' Precincts of Midland County, Texas, have [fol. 381] substantially the same number of people.

Second Point: The Supreme Court erred in holding that Article I, Section 3, Article I, Section 19, and Article V, Section 18 of the Constitution of Texas, when construed together, do not require that the four County Commissioners' Precincts of Midland County, Texas, have substantially the same number of people.

Third Point: The Supreme Court erred in holding that the trial court was without authority to enter the order embodied in its judgment which required the Commis-

[File endorsement omitted]

sioners' Court of Midland County to divide said County into four County Commissioners' Precincts for the convenience of the people of said County and in so doing to establish such Commissioners' Precincts so that each will have substantially the same number of people.

Fourth Point: The Supreme Court erred in reversing the judgment of the trial court for the reason that such judgment, when considered as a whole, is in accordance with the opinion of this Court.

Petitioner respectfully prays that this motion be granted and that the judgment of the Court of Civil Appeals be reversed and the judgment of the trial court be affirmed. [fol. 382] With leave of the Court, Petitioner will shortly file a brief in support of this Motion For Rehearing.

William A. Olson, 900 Brazos Street, Houston, Texas 77002, Attorney for Petitioner.

Proof of Service (omitted in printing).

[fol. 383] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 384]

IN THE SUPREME COURT OF TEXAS

From Midland County—Eighth District

No. A-11,272

HANK AVERY,

vs.

MIDLAND COUNTY, TEXAS, et al.

ORDER DENYING PETITIONER'S MOTION FOR REHEARING—
October 12, 1966

Petitioner's motion for rehearing, filed in the above numbered and entitled cause on July 28, 1966, having been duly considered, it is ordered that said motion be, and hereby is, overruled.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 385]

SUPREME COURT OF THE UNITED STATES

No. 958, October Term, 1966

HANK AVERY, Petitioner,

v.

MIDLAND COUNTY, TEXAS, et al.

ORDER ALLOWING CERTIORARI—June 12, 1967

The petition herein for a writ of certiorari to the Supreme Court of the State of Texas is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.